STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Case Type: Other Civil

- -

The State of Minnesota,
by Hubert H. Humphrey, III,
its Attorney General,
and
Blue Cross and Blue Shield
of Minnesota,

Plaintiffs,

vs. File No. C1-94-8565

Philip Morris Incorporated,
R.J. Reynolds Tobacco Company,
Brown & Williamson Tobacco Corporation,
B.A.T. Industries P.L.C., Lorillard
Tobacco Company, The American Tobacco
Company, Liggett Group, Inc., The Council
for Tobacco Research-U.S.A., Inc., and
The Tobacco Institute, Inc.,

Defendants.

- -

DEPOSITION OF GEORGE D. GREEN, Ph.D.

Volume II, Pages 237 - 417

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(The following is the continuation of the deposition of GEORGE D. GREEN, Ph.D., taken pursuant to Notice of Taking Deposition, at the offices of Dorsey & Whitney, Pillsbury Center South, 220 South Sixth Street, Minneapolis, Minnesota, commencing at 9:28 a.m., August 27, 1997.

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APPEARANCES

On Behalf of the Plaintiffs:
Susan Richard Nelson
Robins, Kaplan, Miller & Ciresi, L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015

On Behalf of Defendant Philip Morris:
Michael A. Lindsay & Paul J. Robbenolt
Dorsey & Whitney
Pillsbury Center South
220 South Sixth Street
Minneapolis, Minnesota 55402

On Behalf of Defendant Lorillard Tobacco Company:
David S. Miller
Doherty, Rumble & Butler
2800 Minnesota World Trade Center
30 East Seventh Street
St. Paul, Minnesota 55101-4999

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I N D E X

THE WITNESS	EXAMINED BY	PAGE
George D. Green	Ms. Nelson	240

E X H I B I T I N D E X

EXHIBIT #	PAGE MARKED	DESCRIPTION
3033 - 3041	245	Database Articles
3042 - 3055	278	Database Articles
3056 - 3102	363	Database Articles

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P R O C E E D I N G S

BY MS. NELSON:

Q. Good morning, Mr. Green.

A. Good morning.

Q. You understand that you remain under oath today?

A. Yes.

MS. NELSON: Mr. Lindsay, I have had an opportunity to both talk to Ms. Walburn and to review the transcripts of the expert depositions taken thus far in this case. And so I think I am in a much better position today to know at least what our position is with respect to the issues that we were uncertain about yesterday.

My understanding is that in all of the depositions that have been taken of plaintiffs' experts we have permitted the following types of questions.

First, on the subject matter of drafts of reports, we have permitted the question: How many drafts were prepared? Where are the drafts? Were the drafts provided to counsel? Were substantive changes made by counsel? And were -- was the report rewritten incorporating counsel's substantive changes? We permitted yes/no answers to those sets

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of questions.

On the topic of preparation for deposition, we permitted similarly yes/no questions with respect to -- yes/no answers with respect to the following questions: Did you meet with counsel to prepare for the deposition? How many times? How long did you spend preparing for the deposition? Who was present when you prepared for the deposition? Did counsel provide you documents in the course of your preparation of the deposition? Were those documents pre-designated? Were the documents -- did the documents include documents other than the documents pre-designated? Did counsel send you documents to prepare for your deposition?

With respect to the questions about preparing the report, we permitted the questions: Did counsel, yes or no, send you copies of documents? And then the identity of those documents.

We did not permit questions with respect to substantive communications between counsel and expert on the subject of the drafts or on the subject of the preparation for the deposition. And that's where the line was drawn.

We also permitted inquiry into the meetings that occurred between expert and counsel prior to the

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preparation of the report to the extent that they sought logistical or factual information. For instance: How many times did you meet with counsel? Who was present at the meeting? Were you provided documents?

Perhaps I should put all of what I view as our disputes on the record and then hear your response.

MR. LINDSAY: That's fine.

MS. NELSON: Finally, on the question of the interpretation of paragraph Roman Numeral II A 1, subparagraph E, which requires the production of a listing of all principal treatises, articles, or documents relied upon by the expert in support of his or her opinion. It is my understanding that there is no question what that means and that has been discussed at some length. And that plaintiffs, in response to defendants' demands, provided a listing of all treatises, articles, and documents relied upon in any fashion, whether it's duplicative, or backup, or whatever, in support -- by the expert in support of his or her opinions.

Never have we agreed that a witness may produce a listing of documents that were illustrative, or that were examples. Nor did we agree to draw a distinction between documents which provide

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evidentiary support versus other documents that provide additional evidentiary support. But, rather, we required our experts, at defendants' demand, to list all documents, and have done so.

This is our proposal for how to handle this matter, which is of very significant concern to us. And the reason it's of significant concern is that in order for us to have a fair opportunity to prepare our cross-examination of this witness for trial, at a minimum we need to know what he reviewed to the extent he intends or may rely upon.

If the defendants choose to interpret this provision as Mr. Green has, or as he has at your request, to include documents illustrative, as he has described on the record yesterday, then we will interpret it that way, too, and we will provide our experts with many additional documents which would be just further evidence as he was discussing yesterday of their opinions and we will provide you only with illustrative documents which support their opinions. My point being that we need to have a bilateral agreement on this.

If the position doesn't change today, then that's what we will instruct our experts to do from here on out. And the depositions from here on out,

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or the supplemental disclosures, will be done with that understanding.

And I think that completes all of the issues that I can recall, at least yesterday, that we were concerned about.

MR. LINDSAY: Just as a logistical matter, counsel, you've obviously had a fairly lengthy list of items here. My question to you is: I think it would be appropriate for me to confer with one of my co-counsel who is not present in the room today. If you wanted to proceed into any of these areas immediately, then I should do that now. If you plan to do that at some later point in the day, and I have no idea how much additional interrogation you have outside of these areas, then I could take that break at a time when we would otherwise be breaking anyway.

MS. NELSON: Would your co-counsel be present here? Or would you have to reach them by phone? Is there some plan we could make for a particular time for you to have this meeting? Would that be the most expeditious way?

MR. LINDSAY: Actually, do you have a sense of how much more time you expect to use today?

MS. NELSON: I can easily proceed without

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addressing these issues until an appropriate break time. So that's not a problem.

My concern simply is that at that break time, whoever that person is, the person is available, so we can make a record. . Because we do need to make a record and I do need to ask all these questions today.

MR. LINDSAY: Why don't we take like a two-minute break right now, so I can make sure I can make that arrangement for a later time today.

MS. NELSON: Sure.

Let's go off the record.

(Recess taken.)

(Exhibits 3033 - 3041 marked for identification.)

MS. NELSON: Back on the record.

BY MS. NELSON:

Q. Mr. Green, we're going to review another group of documents that you produced, along with your report. And just to remind you: The questions I'm going to ask you about are who prepared them. I may ask you some additional questions in that regard. . I'll ask whether you relied upon them and in what way you relied upon them.

Starting with Exhibit 3028, it's a one-page

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document, it appears to come from the Business Index database. I don't know if ASAP is part of that database or whether that's the search requirement. And the search was Blue Cross and Blue Shield Association, Products and Technology, from the University of Minnesota.

My first question to you, Mr. Green, is whether you prepared this document?

A. This document was prepared at my request by Kate Thomas.

Q. Did you review the -- either the abstracts or the text available for each of these statements?

A. It says here text attached. I don't know whether the text was attached, and I haven't gone through that whole stack of documents to see. But if the text was attached, I reviewed it. I certainly reviewed the abstracts.

Q. If the text was attached why wasn't it produced to me?

A. That would suggest that it wasn't attached.

Q. In what way are you relying, if you are relying on Exhibit 3028?

MR. LINDSAY: Objection.

MS. NELSON: I'll rephrase the question.

BY MS. NELSON:

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Q. Are you relying on Exhibit 3028?

MR. LINDSAY: Objection.

THE WITNESS: (Reviewing document.)

I don't think there's anything in these documents that was relevant to the report, as it turned out.

BY MS. NELSON:

Q. Turning, then, to Exhibit 3029, a single-page document, source of which is Business Insurance, August 15, 1994. Volume 28, note 33, page twenty-five, (1). The title is unclear. It appears to say, "Blues Take Step Forward. Senate hearings end with Blues promising accountability." The author is Mark Hofmann.

Mr. Green, did you prepare Exhibit 3029?

A. This was prepared at my request by Kate Thomas.

Q. And have you ever read the underlying source for this abstract?

A. I don't believe so.

Q. And in what -- are you relying on Exhibit 3029?

MR. LINDSAY: Objection.

THE WITNESS: I see this document listed in the works reviewed list in Exhibit 3005. I'm not sure whether I have a copy of the full document or only of the abstract in this case. I don't think the

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document was directly relevant to -- to the report.
BY MS. NELSON:
Q. And presumably if you had a copy of the full document you would have included it in the disclosure of your underlying work papers?
A. That was certainly my intention throughout.
Q. Document 3030 is a two-page document, Search History of articles on Blue Cross and Blue Shield of Minnesota. The source is Knight-Ridder, Tribune, Business News, June 30, 1995.
Did you prepare this document, Mr. Green?
A. This document was prepared at my request by Kate Thomas.
Q. This document references a newspaper article about a particular lawsuit that Blue Cross was involved in; is that correct?
A. Yes.
Q. Have you ever reviewed the complaint in this case?
A. In this lawsuit that's referred to in the article?
Q. Yes.
A. No.
Q. Have you ever reviewed the answer?
A. No.

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Q. Have you ever reviewed any of the underlying documents in that litigation that are publicly available at the courthouse?

A. No.

Q. Whose handwriting is on this document?

A. Mine.

Q. I note in your report that you quote from this newspaper article, as opposed to the underlying primary sources, because you in your report refer to the Blues billing subscribers a percentage based on retail prices which are substantially higher than the wholesale prices the Blues actually pay; is that correct?

MR. LINDSAY: Sorry.

Were you attempting to quote from the report?

MS. NELSON: I'm suggesting -- I'm not suggesting. I'm saying that language is in the report, yes.

MR. LINDSAY: Could you give us a page reference?

MS. NELSON: I'll try to.

It's on page twelve.

BY MS. NELSON:

Q. On page twelve in the first full paragraph Mr. Green discusses this article; is that correct,

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Mr. Green?

A. The article is cited in the footnote to that paragraph.

Q. And you don't cite any other source for that paragraph; is that correct?

A. That's correct.

Q. And are you aware of any other source for the paragraph?

A. This was the source for that paragraph.

Q. So you relied on the newspaper article for that paragraph?

A. Yes.

Q. And in that paragraph you indeed refer to the charges the customer paid as a percentage of retail charges; is that correct?

A. Customers paid 20% of retail charges. But the Blues negotiated wholesale prices with hospitals and doctors.

Q. So you referred to the customers paying 20% of so-called retail charges and the Blues paying -- negotiating wholesale prices; are those the words you used?

A. Yes.

Q. What are the real words used in the contract, Mr. Green?

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MR. LINDSAY: Objection.

THE WITNESS: I have not sought out to read the contracts that were underlying this lawsuit.

BY MS. NELSON:

Q. Would you agree with me that by discussing retail and wholesale, that the suggestion you were making was that the retail charges would be greater than the wholesale charges?

A. Yes.

Q. Do you know whether that's true or not?

A. I haven't investigated the contracts or the underlying documents of the lawsuit.

Q. But you do conclude, don't you, from this newspaper article, that Blue Cross and Blue Shield of Minnesota -- and I'm reading from your report at page twelve, had quote, "Structured their reimbursement to providers and their contract rates, so as to increase the company's returns at the expense of their contracting members"; are those your words?

A. Yes.

Q. And what is that based on, other than this newspaper article?

A. It's based on this newspaper article and similar articles for which this is one example. I think

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there were other articles in the --
Q. In the newspaper?
A. From newspapers or perhaps from the magazine database, discussed this case. I relied upon this particular newspaper article and footnoted it specifically as the source for this paragraph.
Q. Did you rely on Exhibit 3030 for any other purpose?
MR. LINDSAY: Objection.
THE WITNESS: This was the main place in the report where it was relevant.
BY MS. NELSON:
Q. Over the course of thirty-five years at the University, sir, and throughout all your publications have you ever previously relied on a newspaper article that reported about primary sources in the public domain without checking those primary sources?
MR. LINDSAY: Objection.
THE WITNESS: How I would rely on a newspaper article and for what purpose would depend very specifically on the context of the discussion, the centrality of the subject, and any concerns I might have about the accuracy of the newspaper article as the source of evidence. I review and use newspaper articles as evidence, along with other bodies of

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evidence, and exercise judgment as to their sufficiency.

BY MS. NELSON:

Q. If I reviewed the publications listed on your CV, would I see newspaper articles listed as exclusive references for information you report as a historian?

A. Yes.

MR. LINDSAY: Objection.

BY MS. NELSON:

Q. Let's go back to your CV and I'd like you to tell me where I'd find those.

This is Exhibit 3003. Okay. Please identify for me on your resume, Mr. Green, in your publications, where you have cited newspaper articles, again, as the exclusive source, when there are primary sources in the public domain available to you, and they are not cited along with newspapers.

MR. LINDSAY: Objection.

THE WITNESS: You just changed the question.

BY MS. NELSON:

Q. Okay. Well, then if I have, then let me ask that question.

In any of your publications over thirty-five years, have you ever cited to a newspaper article as

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the exclusive source for reporting history --

A. Yes.

Q. Without --

I haven't finished my question.

A. All right.

Q. -- without looking at or citing to primary sources available to you in the public domain?

MR. LINDSAY: Objection.

THE WITNESS: I have used newspaper articles as sources. Certainly in the book on Finance and Economic Development in the Old South.

BY MS. NELSON:

Q. In that book, Finance --

A. And --

Q. Let's take them one at a time. .

In Finance and Economic Development in the Old South did you use newspaper articles as exclusive sources when there were available to you primary sources in the public domain?

A. When I used the newspaper articles I didn't always investigate whether there were primary sources available because the newspaper articles seemed sufficiently reliable for the particular point upon which I was drawing on.

Q. Well, your book on Finance and Economic

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Development in the Old South is for a period of time from 1804 to 1861; is that correct?

A. That's correct.

Q. And so would it be reasonable to assume that there were primary sources in the public domain which would support newspaper articles?

MR. LINDSAY: Objection.

THE WITNESS: There might well have been for some of the material in the newspaper articles, yes.

BY MS. NELSON:

Q. And you didn't search those out?

A. That's correct. Because I didn't believe it was necessary or relevant for the purpose on which I was relying upon those newspapers.

Q. Do you believe newspapers in 1996 and 1997 and -- I can't recall if that was 1995 -- are reasonably accurate sources for a historian to rely upon in reporting history without looking at primary sources in the public domain?

MR. LINDSAY: Objection.

THE WITNESS: Again, it depends on the context, the question, the importance of the particular facts at issue, and whether there's a problem with the reliability of the newspaper. Editorial comments are different from news articles. But I would certainly

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permit my students, and have, to use newspapers as a source for information, without, in every case, necessarily checking publicly-available documentation to the same effect. I consider them, in general, some newspapers more than others, a pretty reliable source for certain kinds of information.

BY MS. NELSON:

Q. Why was that newspaper article reliable to you for this purpose?

A. I made that judgment at the time in preparing this report.

Q. So it would be embarrassing for you to learn that it indeed reported inaccurate facts, wouldn't it?

MR. LINDSAY: Objection.

THE WITNESS: That strikes me as your leading question.

BY MS. NELSON:

Q. It's a leading question, that's for sure. But I'm permitted to do that.

Would it be embarrassing for you to learn that the article inaccurately reported the facts as they are portrayed in the public domain in documents available to you?

MR. LINDSAY: Objection, vague and ambiguous.

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BY MS. NELSON:
Q. You can answer the question.
A. It would depend on how important the facts were, as to their accuracy and inaccuracy, as to whether it would alter the conclusion that I reached from that particular piece of evidence. But if indeed the -- the underlying sources led me to a different conclusion, then I would change the conclusion.
Q. Did you inquire of anybody whether or not there were primary materials available to you on the co-insurance issue?
MR. LINDSAY: Objection.
THE WITNESS: On this particular newspaper article?
BY MS. NELSON:
Q. On the co-insurance issue, yes, that you report about in your report.
A. I did not seek further documents beyond this newspaper article for this particular question.
Q. Okay. Let's finish with your resume. Tell me the other publications in your resume, again, where you would have relied exclusively on newspaper articles without reviewing primary sources available to you in the public domain.
MR. LINDSAY: Objection.

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THE WITNESS: There are other article-length pieces related to the Louisiana banking project. I'm not sure at this time which of them would have specific footnotes to newspaper sources. But they're out of the same body of research as the book that I previously mentioned. And it may well be that they would contain some footnotes from newspaper sources. Specifically, the article on the Louisiana Bank Act of 1842 and the article on Banking and Finance in Ante-bellum, Louisiana. And the chapter on Louisiana, 1804 to 1861 in Rondo Cameron's book, Banking and Economic Development. And the Citizens Bank of Louisiana, papers at the Business History Conference.

MS. NELSON: Mr. Lindsay, based on this testimony and previous testimony regarding the publications identified in Mr. Green's resume, and based on my review of the state of the record currently on this issue, I am formally requesting that counsel for the defendants immediately provide to us the limited numbers of publications that are identified on Mr. Green's resume, pursuant to the court order on the record.

MR. LINDSAY: Have you attempted to locate them yourself, counsel?

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MS. NELSON: I am advised that we have been willing to provide them to you and so we expect, in turn, that courtesy.

I don't believe it would be reasonable for us to provide them to you and then us to find yours. It seems to me there has to be a two-way street here.

We believe the Court order is clear and we disagree with Mr. Schwartzbauer's interpretation. His primary concern has to do with volume. There's not an issue here on volume and so this is a very simple request to comply with the court order.

Just make my record on that.

MR. LINDSAY: Okay.

BY MS. NELSON:

Q. Looking then at Exhibit 3031, which is a multi-paged document, the source of which is the Health Care Financial Management, November 1993, Volume 47, note eleven, page thirty, (6), entitled, "Blue Cross Blue Shield CEO Tresnowski calls for insurance reform."

Did you prepare this document, Mr. Green?

A. This document was prepared at my request by Kate Thomas.

Q. Have you reviewed the underlying source for this document?

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A. The full text is provided in the printout from which this is a Xerox.

Q. This is the full text of that portion of the document; is that correct? Or is this the full text of the entire article?

MR. LINDSAY: Objection.

THE WITNESS: It says on the document, "Full Text COPYRIGHT Healthcare Financial Management Association.

It says at the end of the document "End"; from that I would infer that it is the full text of the entire article.

BY MS. NELSON:

Q. Is this your handwriting on this document?

A. Yes.

Q. In what way have you relied --

Have you relied on this document?

MR. LINDSAY: Objection.

THE WITNESS: I don't believe this document supports any specific statements in the report.

BY MS. NELSON:

Q. Exhibit 3033 is the next document. It is a multi-page document, Search History, was for articles on Blue Cross Blue Shield Association. The source is Hospitals and Health Networks, February 20, 1996,

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volume 70, note 4, page 68, (1). Entitled, "Patrick Hays, CEO Blue Cross and Blue Shield Association of America." Did you prepare this document, sir?

A. This document was prepared at my request by Kate Thomas.

Q. And this is your handwriting on the back of it?

A. Yes.

Q. Did you rely on this document?

MR. LINDSAY: Objection.

THE WITNESS: This document is cited in footnote twenty-one on page eight of my report.

BY MS. NELSON:

Q. Is that the only way in which you relied on the document?

MR. LINDSAY: Objection.

THE WITNESS: I believe that's the portion of the report to which it was relevant.

BY MS. NELSON:

Q. Exhibit 3034 is a search document and attached to it appears to be the article that was searched. I can't tell whether the article is provided in its entirety. The search is for Blue Cross and Blue Shield Association. The source is Money Magazine, January 1997. Volume 26, note 1, page 98. The title is, "How the new Blue Cross may bite you

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while Blues execs may stand to reach huge profits at your expense, some policyholders face soaring premiums." Starts on page 98. But it is unclear whether it concludes on page 102. Perhaps it does, but would you agree with me it's a bit uncertain?

MR. LINDSAY: Objection.

THE WITNESS: It appears to conclude there. BY MS. NELSON:

Q. Okay.

A. And I assume that Kate would have copied the whole article, as was her practice.

Q. Have you relied on this article?

A. It is cited in footnote twenty-one, page eight of the report.

Q. Is that the only way in which you've relied on it, sir?

MR. LINDSAY: Objection.

THE WITNESS: That's the portion of the report to which it was relevant.

BY MS. NELSON:

Q. Have you, in the course of your search, examined whether the compensation of management to Blue Cross Blue Shield of Minnesota is competitive with comparable compensation of non-profits of its size throughout the country?

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A. I have not researched that question.
Q. Have you compared the compensation of the management of Blue Cross Blue Shield of Minnesota with the compensation of management of the traditional health care insurance companies which you discuss in your report?
A. I have not researched that question, nor have I commented on it in the report.
Q. I presume, then, that you will have no opinions on that issue?
MR. LINDSAY: Objection.
BY MS. NELSON:
Q. Is that correct, Mr. Green?
MR. LINDSAY: Objection.
THE WITNESS: I may investigate that question further. I included no comments specifically on that topic in the report.
BY MS. NELSON:
Q. You offer no opinion in the report. Are you suggesting you may come up with new opinions before trial?
MR. LINDSAY: Objection.
BY MS. NELSON:
Q. As opposed to supplementing your current opinions?

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MR. LINDSAY: Objection.

THE WITNESS: (Reviewing documents.)

MS. NELSON: I would note for the record that the witness frequently takes a great deal of time on the record to review his own report and one would expect him to be familiar with his own report. And I do object, given the fact that our time on the record is limited.

MR. LINDSAY: I object to the argumentative statement just made by counsel. Counsel has been free at any time during this deposition to make any notations that she wishes on the record. And now to attempt to describe any past events during this deposition is unfair and inappropriate.

If counsel wishes at any time to note that the witness is referring to his report, that's fine. It is particularly appropriate, when counsel has asked this witness a question, which essentially calls for speculation and a legal conclusion, and if the witness is, therefore, puzzled by exactly what counsel is searching for, then it would be reasonable for him to review his report.

MS. NELSON: Mr. Lindsay, that is an utterly inappropriate objection under the court order. That is the very kind of speaking objection and coaching

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objection that this judge has specifically told us not to engage in. That is a classic example of an inappropriate objection.

The record does speak for itself. . Every time Mr. Green looks at his report the time is recorded on the record, and I can count it up and be able to count the minutes that he has spent looking at his own report. . The record is clear. I don't need to make any further record.

MR. LINDSAY: That's fine, counsel.

BY MS. NELSON:

Q. Do you have an answer to the question, Mr. Green?

A. Would you repeat the question?

Q. Yes.

MS. NELSON: Would you please read the question back?

MR. LINDSAY: I think you'll have to repeat back about four questions because the question had several components.

THE WITNESS: (Record read.)

MR. LINDSAY: Note my objections.

THE WITNESS: I've offered opinions in the report about the potential divergence of interest between Blue Cross Blue Shield of Minnesota and its

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members, and specifically as one party in that. And I'm looking at page ten of the report, Blue Cross managers and other employees as one stakeholder.

BY MS. NELSON:

Q. Yes. And beyond --

A. It's not a subject -- the facts -- I have not investigated the facts yet. But one could readily elaborate that line of analysis by investigating salary structures at Blue Cross Blue Shield of Minnesota, with particular reference to top managers.

Q. And your view, sir, is that you would not view that as a new opinion in this case; is that what you're saying?

MR. LINDSAY: Objection.

THE WITNESS: It would be a corollary or further development of the opinion presented in this section of the report.

BY MS. NELSON:

Q. Do you have a present intention of doing that?

A. I'm not sure.

Q. Or are you in the course of doing it?

A. I'm not in the course of doing it.

Q. Do you have a present intention of doing that?

A. It's a line of investigation I had considered, but have not yet developed.

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Q. Despite the fact that your report was due a month ago?

MR. LINDSAY: Objection.

BY MS. NELSON:

Q. Is that correct?

A. My report was provided with the research completed to that date. My understanding is that I'm free to develop further research to support the opinions and conclusions in the report between now and such time as I might testify at trial.

Q. So --

A. This is one of the areas where one might pursue further evidence.

Q. So this report is nothing more than a report on where you were in the research at the time it was due; is that correct?

MR. LINDSAY: Objection, argumentative. Calls for a legal conclusion.

BY MS. NELSON:

Q. You can answer the question.

A. This report constitutes the opinions and conclusions that I have formed from my research at the time that I submitted the report.

Q. But it is your understanding that you can continue research that could have been done before

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you issued the report and supply new and additional reports with new and additional opinions based on research readily available to you?

MR. LINDSAY: Objection.

THE WITNESS: I didn't say that.

BY MS. NELSON:

Q. Prior to the time of the report.

MR. LINDSAY: Objection. Vague, argumentative, and misstates the testimony.

BY MS. NELSON:

Q. What did you say that's different from what I just said?

MR. LINDSAY: Objection. Calls for the witness to attempt -- I'll just object.

THE WITNESS: Rather than trying to engage your specific phrasing... What I did say, I believe, is that I have submitted a report which contains my opinions and conclusions at the time that the report was prepared. I understand it to be possible to deepen the evidence and research to provide evidence relating to these conclusions and opinions that are already presented in the report.

BY MS. NELSON:

Q. Yes. And is there --

A. Not to form totally new opinions.

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Q. Okay. And do you render an opinion, and please show me where it is, in this report, regarding the compensation of Blue Cross Blue Shield of Minnesota management?

MR. LINDSAY: Objection.

BY MS. NELSON:

Q. Is there an opinion offered here, sir?

MR. LINDSAY: Objection.

THE WITNESS: As I stated earlier, I render an opinion about the potential divergence of interests between Blue Cross and its members, and within that identify several different stakeholders, among them the Blue Cross managers. And I see that topic as a corollary to the topic of -- the compensation of the Blue Cross managers and the employees, as a corollary of that argument in the report about potential conflicts of interest among these various stakeholders.

BY MS. NELSON:

Q. So you've reached the conclusion that there are conflicts of interest among these stakeholders, without having done the initial research as to whether or not a search of the compensation levels would support that opinion or not?

MR. LINDSAY: Objection.

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BY MS. NELSON:

Q. You're assuming that that search would support your opinion? Is this what you're saying?

MR. LINDSAY: Objection, compound and argumentative.

THE WITNESS: That's not what I'm saying. That's definitely not what I'm saying.

BY MS. NELSON:

Q. But that is the opinion for which your research you claim would be relevant; is that right?

MR. LINDSAY: Objection.

THE WITNESS: This section of the report, appearing on pages nine -- well, eight through twelve, I guess it is, contains an argument for which I think a corollary might be the compensation levels of the senior management of Blue Cross Blue Shield.

BY MS. NELSON:

Q. Okay. Let me use your very words. Your very words were pages eight through twelve contains an argument; is that what you said?

A. Yes. An opinion, an argument.

Q. Okay. It's your argument. And your argument is, is it not, that there's a divergence of interest between Blue Cross and other entities, including about BCBSM managers; isn't that your argument?

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MR. LINDSAY: Objection.

THE WITNESS: That doesn't quite state my argument accurately. We could read the argument more specifically, if you like.

There's a divergence of interest among the stakeholders, of whom the managers are one stakeholder. The subscriber members are another category of stakeholders, and there are several others listed on page eleven.

BY MS. NELSON:

Q. Yes, I see that.

And what you've now said is that your research on compensation levels of BCBSM management would be a corollary to that argument; is that what you said?

MR. LINDSAY: Objection, misstates the testimony.

THE WITNESS: It would be a -- the research into the compensation levels would be a corollary to the opinion presented and developed on pages eight through twelve of the report.

BY MS. NELSON:

Q. Thank you.

Okay. Turning to Exhibit 3035, it's a multi-page document entitled, "A new rhythm for the Blues. Blue Cross and Blue Shield Association health

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care systems." And apparently includes a related argument -- I don't mean argument -- article. And I can't tell from this whether the full text of both articles is attached or not. Can you, sir?

MR. LINDSAY: Sorry. Counsel, are you suggesting that the -- well, I think you made reference to both articles. Could you please identify which articles you're now referring to?

MS. NELSON: I'm referring to both articles. I'm wondering whether their full text appears here.

THE WITNESS: It appears to me that the two articles we're talking about are one headed, "A new rhythm for the Blues," and the other a related article on President Patrick G. Hays. And it appears, as we look at the full text copyright printed out below that search capsule at the top of the first page of this document, that the full text of both parts is contained.

There is, on about the fifth page in, or the sixth page in, a heading in caps, "Managed Care Captures The CEO Seat In The Blue Cross Board Room." And that is -- what follows appears to be the article about Patrick Hays, and it concludes with brief resume-type information about Mr. Hays. And at the end of the page of this script it says "End," so I

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would conclude upon reading this morning that the full text of the article and the included related article are here provided.

BY MS. NELSON:

Q. Sir, did you prepare Exhibit 3035?

A. This was prepared by Kate Thomas at my request.

Q. Have you relied on this exhibit?

MR. LINDSAY: Objection.

THE WITNESS: It appears in footnote twenty-one of page eight of my report.

BY MS. NELSON:

Q. Is that the only place in which you've relied?

A. I think that's the portion of the report to which it is relevant.

Q. Exhibit 3036, a multi-page document entitled, "Forget everything you thought you knew about the Blues." It is from Medical Economics, March 25, 1996, and appears to have a full text attached. Would you agree with me, sir?

A. Yes.

Q. Who prepared Document 3036?

A. This was prepared by Kate Thomas at my request.

Q. Have you relied on it?

MR. LINDSAY: Objection.

THE WITNESS: It appears in footnote

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twenty-one, page eight of my report.
BY MS. NELSON:
Q. Have you relied on it for any other purpose?
A. That appears to be the portion of the report to which it's relevant.
Q. Exhibit 3037 appears to be an article from U.S. News and World Report dated November 4, 1996. And it appears to have a full text attached; is that correct, sir?
A. Yes.
Q. Who prepared Exhibit 3036?
A. This was prepared by Kate Thomas at my request.
Q. Whose handwriting is on there?
A. The underlining is mine. The notation may be hers. I'm not certain.
Q. Did you rely on this?
MR. LINDSAY: Objection.
THE WITNESS: It appears in footnote twenty-one on page eight of my report. It was relevant to that section of my report.
BY MS. NELSON:
Q. Did you make any effort to review underlying sources for this report?
MR. LINDSAY: Objection.
THE WITNESS: The other sources listed in that

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same footnote have overlapping content with some of the discussion in this report. I did not conduct further research in primary sources on this particular part of the report.

BY MS. NELSON:

Q. Exhibit 3038, an article from Newsweek magazine, dated April 22, 1996. Appears to have a full text attached; is that correct?

A. Yes.

BY MS. NELSON:.

Q. Who prepared this document?

A. Kate Thomas prepared this document at my request.

Q. Have you relied upon this document?

MR. LINDSAY: Objection.

THE WITNESS: This document appears in footnote twenty-one on page eight of my report.

BY MS. NELSON:

Q. Did you make any effort to research underlying sources -- primary underlying sources for the claims made in this Newsweek article?

MR. LINDSAY: Objection.

THE WITNESS: As I said in answer to the previous question about the previous document--I did not conduct primary source research on this

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particular paragraph on the report.
BY MS. NELSON:
Q. Exhibit 3039 appears to have two sources listed, with one source Xed out; is that correct, sir?
A. That appears to be the case.
Q. Is that X your X?
A. I believe it's Kate Thomas's.
Q. Can I --
A. The two sources appear on the same print. But the full text appears to be provided for the second source.
Q. Can I assume that since the first source has a big X through it, that you're not relying upon it?
A. Yes.
Q. And the second source is from National Underwriter Life and Health-Financial Services Edition, September 23, 1996; is that correct?
A. Yes.
Q. And have you relied on this document?
MR. LINDSAY: Objection.
THE WITNESS: I don't believe that this document supports any specific statements in my report. I don't see it in the footnotes.
BY MS. NELSON:
Q. Exhibit 3040 is a single-page document from the

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magazine Consumer Reports, dated September, 1995; is that correct?

A. It's a -- I think a database summary of -- or abstract of that Consumer Reports' article.

Q. Is it an abstract or simply the title?

A. As a matter of fact, the title citation and only subject heads.

Q. Is the full text of the report attached to this document?

A. No.

Q. Have you reviewed the text of the report?

A. No.

Q. Have you relied on Exhibit 3040?

A. No.

Q. Exhibit 3041 is a single-page document identifying the source of Business Week, June 24, 1996. It contains an abstract, but does not contain the full text of the article to which it refers; is that accurate, Mr. Green?

A. Yes.

Q. Who prepared Exhibit 3041?

A. Kate Thomas, at my request.

Q. Have you reviewed the article to which this refers?

A. No.

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Q. Have you relied on Exhibit 3041?
A. No.
MR. LINDSAY: Objection.
MS. NELSON: Why don't we take five minutes?
(Recess taken.)
(Exhibits 3042 - 3055 marked for identification.)
MS. NELSON: Back on the record, then.
BY MS. NELSON:
Q. Mr. Green, yesterday we talked a bit about quality assurance and cost-containment measures that were undertaken by Blue Cross in the early 1980s; do you recall that discussion?
A. A general way, yes.
Q. Well, let me help you refresh your recollection. We talked a little bit about the fact that costs had exceeded the Consumer Price Index in those years. We talked about small area analysis. We talked about interventions with women at risk for premature birth. Does that help refresh your recollection?
A. Yes.
Q. We talked about the Itasca Heart Project, I believe; is that correct?
A. Yes.

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Q. Wouldn't you agree with me, Mr. Green, that the institution of MedisGroups, which is identified on page ninety-four of what you refer to as the Company History, is a quality measurement system which distinguishes Blue Cross from traditional for-profit health-care insurers in this state?

MR. LINDSAY: Objection.

THE WITNESS: Clearly MedisGroups is a quality measurement system that Blue Cross adopted and I'm not aware that it was adopted by the for-profit companies in Minnesota.

BY MS. NELSON:

Q. And, indeed, Blue Cross --

A. Specific procedure.

Q. Would you agree with me that, indeed, Blue Cross was the first organization in the nation to install this system in hospitals?

A. I don't know.

Q. Do you have any reason to dispute that statement in the Company History?

A. No.

Q. Turning, then, to the Focus Program, are you familiar with that aspect of Blue Cross's history?

A. From the Company History.

Q. And wouldn't you agree with me that the

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Focus Program provided Blue Cross a unique opportunity, given their direct contracts with providers, to involve themselves in the appropriateness of health-care delivery and thereby improve the quality of care to Blue Cross subscribers?

MR. LINDSAY: Objection.

THE WITNESS: I haven't researched the Focus Program in depth. I would accept the description provided in the Company History as the only basis of knowledge about that program that I have.

BY MS. NELSON:

Q. Did you ask when you reviewed the 4B indicies for the information on the Focus Program?

MR. LINDSAY: Objection.

THE WITNESS: I did not specifically request that material under that name.

BY MS. NELSON:

Q. Did you request it under a different name?

MR. LINDSAY: Objection.

THE WITNESS: I requested material which contained information about small area analysis and particularly its outcomes in the Itasca Heart Project that we discussed yesterday. But I did not seek

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material about the Focus Program.
BY MS. NELSON:
Q. Did you rely on the materials that you reviewed regarding the small area analysis in the Itasca Heart Project?
MR. LINDSAY: Objection.
THE WITNESS: I believe there's discussion of the Itasca Heart Project in connection with the segment of the report addressing the Doctors Helping Smokers program. It was kind of a predecessor to that program, one of the early points of application of that methodology.
BY MS. NELSON:
Q. And wouldn't you agree with me that the Itasca Heart Project had, as its goal, the reduction of heart disease in Itasca County?
A. Yes, it did.
Q. And that would be a direct benefit to those suffering from heart disease, would it not?
A. Yes.
MR. LINDSAY: Objection.
BY MS. NELSON:
Q. And wouldn't you agree with me, to be a fair historian, it would have been appropriate to inquire about any programs instituted by Blue Cross which

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had, as its purpose, improving the quality of care of Blue Cross subscribers, since that's the very core of its mission?

MR. LINDSAY: Objection.

THE WITNESS: I concentrated my research on the topics that I indicated yesterday, specifically Blue Cross and Blue Shield's awareness or knowledge about smoking and health problems and any programs it had relating to smoking and health problems associated with smoking and tobacco. And I particularly sought information with respect to programs that I could identify that had that connection.

BY MS. NELSON:

Q. But you make a rather critical statement about whether Blue Cross has carried on its mission of providing quality health care to the citizens of Minnesota, do you not?

MR. LINDSAY: Objection.

THE WITNESS: I've said in the report that I think they operate in a business-like fashion and that at times their -- the company's interests and the interests of various stakeholders, including its subscriber members, potentially diverge.

BY MS. NELSON:

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Q. So you have not offered the opinion that Blue Cross and Blue Shield is not acting in accordance with its mission?

MR. LINDSAY: Objection.

THE WITNESS: The opinions that I've offered are in the report.

BY MS. NELSON:

Q. Yes, I understand that.

And I'm asking you whether or not you have offered an opinion, or made an argument in your report that Blue Cross is somehow not carrying out its mission of providing high-quality health care to the citizens of Minnesota?

MR. LINDSAY: Objection.

THE WITNESS: Those words don't appear in the report and they seem to me to be an over-generalization of the specific arguments I'm making in the report.

BY MS. NELSON:

Q. Would you agree with me, sir, that proper historical methodology would mandate that if you are critical of Blue Cross's carrying out its mission of providing high-quality health care, that you need to evaluate all of the evidence available to you about its many efforts to do so?

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MR. LINDSAY: Objection.

THE WITNESS: That wasn't the set of questions I was pursuing in my report and so it wasn't the subject and focus of my research.

BY MS. NELSON:

Q. So you have no opinion, then, as to whether or not Blue Cross was seeking to provide high-quality health care to the citizens of Minnesota?

MR. LINDSAY: Objection.

THE WITNESS: The specific opinions I have are in the report.

BY MS. NELSON:

Q. I'm asking you whether you have that opinion or not?

MR. LINDSAY: Objection.

BY MS. NELSON:

Q. Do you criticize Blue Cross as not pursuing high-quality health care for the citizens of Minnesota pursuant to its mission?

MR. LINDSAY: Objection.

THE WITNESS: I believe what I said is that Blue Cross, as a financial intermediary, is in a possession of potential divergence between its business interests and the interests of various stakeholders, including among those stakeholders the

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citizens of Minnesota and, as another specific set of stakeholders, its subscriber members.

BY MS. NELSON:

Q. And in reaching that conclusion did you evaluate the ways in which Blue Cross's pursuance of its mission was directly to benefit its subscribers? Or did you seek only evidence of a divergence of interest?

MR. LINDSAY: Objection.

THE WITNESS: I investigated the question of potential divergence of interests. Not pre-supposing that they necessarily existed. That's a question to be investigated. It's a question both as to potential and as to actual divergence of interests.

BY MS. NELSON:

Q. And in exploring that issue; that is, the so-called divergence of interests, you did not request information on the Focus Program; is that correct?

A. Yes, that's correct.

Q. Wouldn't you agree with me, Mr. Green, that Blue Cross actively promoted wellness and healthy lifestyles throughout the 1980s through its Pre-term Birth Prevention Program, its Doctors Health and

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Smoking Program, its Staying Well Program, and its Health Trek Program?

MR. LINDSAY: Objection.

THE WITNESS: Those programs -- some of them started in the mid 1980s. Each of them was a part of the Blue Cross and Blue Shield wellness activities that occurred in that decade and I think accelerated as the decade advanced.

BY MS. NELSON:

Q. And wouldn't you agree that those wellness activities were directed at attempting to improve the quality of the lives of the citizens of Minnesota?

THE WITNESS: Objection.

THE WITNESS: That's certainly one of the benefits of those programs. It's not necessarily the intention or sole intention of those programs.

BY MS. NELSON:

Q. Is there anything about those programs that would be -- that would create a divergence of interests with the subscribers suffering from those diseases?

A. No.

Q. And wouldn't you agree with me that throughout the 1990s Blue Cross continued to actively promote wellness and healthy lifestyles through the

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Improved Program, Project Health Vision, and Health Journey?

A. Those were similar programs promoting healthier lifestyles and particularly promoting smoking cessation. Several of those cases.

Q. Wouldn't you agree with me that through the Doctors Helping Smokers Program, the Itasca Heart Project, and the Improved Program, that consistently throughout the 1980s and the 1990s, Blue Cross and Blue Shield of Minnesota proactively attempted to provide smoking cessation to its subscribers?

MR. LINDSAY: Objection.

THE WITNESS: It made some efforts in those directions through those programs. Not throughout the '80s because some of those programs don't start at the beginning of the '80s, but part way through the decade, so we have to be careful about the dating.

It didn't make every conceivable effort at smoking cessation. It promoted some programs and elected not to pursue other programmatic activities; such as, for example, paying for smoking cessation programs as a benefit of the medical coverage, that was not consistently done.

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BY MS. NELSON:
Q. Where --
A. So I think they -- they had a set of programs promoting smoking cessation.
Q. Are you aware of any other traditional health-care insurer in the state of Minnesota that had the type and extent of programs that Blue Cross and
Blue Shield of Minnesota had from some point in time in the '80s, which I'm sure we can agree on, to the present, to proactively pursue smoking cessation on behalf of its subscribers?
MR. LINDSAY: Objection.
THE WITNESS: No, I'm not. And I didn't research that question.
BY MS. NELSON:
Q. Would you agree with me that it is an incorrect statement to say that smoking cessation programs were excluded by Blue Cross and Blue Shield of Minnesota throughout the 1980s and the 1990s?
A. They were -- there were such exclusions. There were also some policy categories. Some insurance coverages that Blue Cross and Blue Shield of Minnesota provided that did for a time include some payment of smoking cessation programs.

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Q. Are you --
A. But many of the group policies did not include that coverage.
Q. Your testimony is that there were group policies in that decade which contained no coverage for any smoking cessation; is that your testimony?
A. There were exclusions in the policies for paying for Nicorette gum and similar products to assist in smoking cessation. And there were exclusions -- I don't remember at this moment, as I sit here, the exact wording, but exclusions in some of the policies for smoking cessation, classes, or courses.
Q. Now, with respect to those policies where that exclusion existed, if a subscriber went to his or her physician seeking smoking cessation assistance, would it be covered or not?
MR. LINDSAY: Objection.
THE WITNESS: The language that I saw in the exclusion passage of the contracts suggests that it was not eligible for coverage. I didn't investigate clinic-by-clinic whether doctors' recommendations could override the exclusion language that I saw from -- that was imbedded in some of those contracts.
BY MS. NELSON:
Q. So you believed that the exclusion language

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would require doctors to override it, to gain some coverage, is that what your understanding is?

MR. LINDSAY: Objection.

THE WITNESS: Simply listed as an exclusion of benefit in those contracts.

BY MS. NELSON:

Q. So you did not understand that indeed, even in those contracts with those exclusions, that a subscriber wished to have smoking cessation assistance from his or her physician, that that was a covered charge?

A. I haven't investigated the clinic practices in that respect.

Q. Did you review the deposition of Blue Cross and Blue Shield of Minnesota in this case?

MR. LINDSAY: I'm going to object because the -- if you wish to ask him about a specific deponent, or representative of Blue Cross, I think that would be a more appropriate way of asking the question. Because that deposition, as I understand it, went over several days and several points, so I'm not sure it's --

MS. NELSON: Well, there's one deposition. It's the deposition of Blue Cross and Blue Shield of Minnesota. There were a number of designees.

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MR. LINDSAY: Right.

And you are apparently asking him if he has reviewed the testimony of all those designees.

MS. NELSON: Yeah. It's one deposition. Four volumes.

BY MS. NELSON:

Q. Did you review that transcript?

A. I have read the depositions of some of the designees, but not all.

Q. Have you read the designee, Mr. Niemiec, on the topic of smoking cessation?

A. I've read at least a portion of Mr. Niemiec's deposition. I think all of it, but I'm not certain.

Q. And you don't recall, as you sit here today, his explanation about the coverage for smoking cessation in Blue Cross?

A. I don't recall that specific point from his deposition.

Q. What efforts at smoking cessation didn't Blue Cross take throughout the '80s and '90s, apart from the exclusion of classes provided by nonmedical personnel?

MR. LINDSAY: Objection.

THE WITNESS: I mentioned earlier the exclusion in some of the policies of the use of Nicorette gum

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and other similar products that have -- that are on the market for -- to help people with smoking cessation.

Q. Can you think of anything else?

A. Not at this moment.

Q. And, indeed, we talked yesterday about the fact that Blue Cross and Blue Shield was a founder of the smoke-free 2000 Coalition; is that correct?

A. That is correct.

Q. And instituted the first differential premium in the state of Minnesota; is that correct?

A. For nonsmoker discount, yes.

Q. And health insurance policies?

A. Yes.

Q. And engaged in small area analysis, which identified the Itasca Heart Project, which certainly distinguished it from other traditional health carriers; would you agree?

A. Yes.

Q. And was a co-principal investigator in the Doctors Helping Smoking Program, which was designed to proactively encourage physicians in the network to work with their patients to reduce the incidence of smoking; is that correct?

MR. LINDSAY: Objection.

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THE WITNESS: One of Blue Cross's affiliated physicians, Leif Solberg, was a co-principal investigator in Doctors Helping Smokers, along with Dr. Thomas Kottke.

BY MS. NELSON:

Q. And that was its purpose, that I just discussed?

MR. LINDSAY: Objection.

THE WITNESS: I'd have her read that back. Why don't we read that back?

(Record read.)

MR. LINDSAY: Objection.

THE WITNESS: That was the purpose of the Doctors Helping Smokers program.

BY MS. NELSON:

Q. And that that Doctors Helping Smokers program indeed has been expanded in the Improved Program; is that correct?

A. Yes.

Q. And one of the purposes of the Improved Program, again, is to proactively encourage physicians in the Blue Cross network to work with their patients to reduce the incidence of smoking?

A. Yes.

MR. LINDSAY: Objection.

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BY MS. NELSON:

Q. And the Pre-term Birth Prevention Program was designed to identify and recognize at an early state high-risk pregnancies; is that correct?

A. I believe so. I haven't researched that program in great detail.

Q. So you don't know whether one of the purposes of that program was to encourage pregnant women to stop smoking?

A. Yes, I've seen that aspect of the program. I'm aware of that.

Q. And, again, that's a program, again, designed to improve the quality of care for Blue Cross subscribers, is it not?

MR. LINDSAY: Objection.

THE WITNESS: It's part of their wellness mission, yes.

BY MS. NELSON:

Q. Isn't it true, Mr. Green, that in 1990, Blue Cross and Blue Shield of Minnesota drafted a small group coverage proposal that was adopted almost as drafted by the legislature, which focused on small businesses, which accounted for more than half of all uninsured Minnesotans?

MR. LINDSAY: Objection.

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THE WITNESS: That's not a topic I've researched.

BY MS. NELSON:

Q. So to the extent that Blue Cross was pursuing its mission to reach as many uninsured citizens of the state of Minnesota, you did not research the PEIP program, as it's now known, P-E-I-P?

MR. LINDSAY: Objection.

THE WITNESS: I did not research that specific program.

BY MS. NELSON:

Q. Okay. And isn't it true that Project Health Vision, in part focused on the development of Minnesota's first statewide cardiac network, built to insure quality cardiac care to its subscriber members?

MR. LINDSAY: Objection.

THE WITNESS: I didn't research that program in great detail.

BY MS. NELSON:

Q. And isn't it true that Blue Cross launched a community-based project called Blueprints for Health, which was aimed at communicating the importance of healthy lifestyles to Blue Cross subscribers?

MR. LINDSAY: Objection.

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THE WITNESS: I have read several of the pamphlets, publications produced by Blueprints for Health and that -- that generally describes the program.

BY MS. NELSON:

Q. And, indeed, Blue Cross created an original children's play focusing on educating youth as to healthy lifestyles?

A. That's correct.

Q. And that those efforts; that is, Blueprints for Health, and the children's play, were focused at improving the quality of life for subscribers in the state of Minnesota; is that correct?

MR. LINDSAY: Objection.

THE WITNESS: They were part of Blue Cross's wellness education projects.

BY MS. NELSON:

Q. And, also, both Blueprints for Health and the children's play focused on smoking as one of the unhealthy lifestyles; is that correct?

A. That is true.

Q. Another example of a proactive effort on the part of Blue Cross and Blue Shield of Minnesota to decrease the incidence of smoking among its subscribers?

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A. Correct. And I believe those items are specifically discussed in my report, as well.
Q. Yes.
And isn't it true that Blueprints for Health also held health forums for seniors to address health risks and education in particular to that population?
A. Yes. And including some concerning smoking cessation. And those concerning smoking cessation are also mentioned in the report.
Q. And so wouldn't it also be true that those efforts were an effort to improve the quality of care and health of senior subscribers?
MR. LINDSAY: Objection.
THE WITNESS: Again, they were part of the wellness programs of Blue Cross in that period.
BY MS. NELSON:
Q. And, again, would you agree that it was a proactive effort on the part of Blue Cross to decrease the incidence of smoking among that population?
A. Yes.
Q. And isn't it further true that Blueprints for Health conducted seminars for women dealing with women's health issues including, for instance, breast disease and hormone replacement therapy?

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A. I didn't investigate those other programs.
Q. So you're not aware of the extent to which those would improve the quality of care for female subscribers?
A. I was focusing on programs relating to smoking and health issues.
Q. And isn't it true that Blueprints for Health held seminars for business and community leaders on health-related topics, such as no smoking policies?
A. Yes, they did. And those are discussed, I believe, in the report, as well.
Q. Again, another example of Blue Cross's proactive efforts to decrease the incidence of smoking in the community; is that correct?
A. Yes.
Q. Isn't it true that in the early 1990s the Duluth Medical Center and Blue Cross donated health-care services to a group of Duluth and Superior, Wisconsin, residents who did not have health coverage and didn't qualify for public health insurance?
MR. LINDSAY: Objection.
THE WITNESS: That's not a subject I've researched.
BY MS. NELSON:

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Q. So to the extent that that would be another example of the furtherance of its mission to reach the citizens of Minnesota, you did not investigate that topic?

MR. LINDSAY: Objection.

THE WITNESS: That is beyond the scope of my research on smoking and health-related issues.

BY MS. NELSON:

Q. Isn't it true that in the early 1990S the Aware Gold Health Plan earned a first-place rating in a national magazine's comprehensive evaluation of seventy-one health coverage plans?

A. I don't know.

Q. Do you recall identifying that in your report?

A. I'm not clear what your question is. Identifying that Aware Gold earned a first place award?

Q. Yes.

A. Et cetera?

Q. Do you recall that in your report, sir?

A. No, not at this moment.

Q. I will look for it at a break.

Let me proceed.

Do you recall that in 1991 that Blue Cross's Blueprints for Health Program received an award for

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excellence in health promotion?
A. I don't specifically recall at this moment, but I would believe it's true.
Q. Okay. I would refer you, then, to page twenty-five of your report. Paragraph capital F, the first full paragraph, Blueprints for Health. Does that help refresh your recollection?
A. Yes. The statement is true and included in the report.
Q. Are you aware of any traditional for-profit health-care insurer in the 1990s that received a similar award?
A. I haven't investigated that question.
Q. So you're really not in a position to compare the programs of Blue Cross in the '80s and '90s with respect to wellness and smoking cessation and the like, with the programs of traditional for-profit health insurers; is that correct?
A. That is not correct.
Q. Okay. What programs and which traditional health insurers had such programs in the '80s and '90s?
A. I have not conducted research on individual companies with respect to their programs. I have read extensively, with the assistance of my research

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assistants, the discussions in the insurance industry and related industry trade publications about wellness program activities conducted in those industries and in other companies across the country. I haven't conducted primary research on the wellness programs in other companies, because my research is focused on Blue Cross and Blue Shield of Minnesota.

Q. So I guess my question remains the same: Are you in a position to compare in Minnesota only, traditional health-care insurers and the timing and extent and quality of their wellness programs focused on quality of care and smoking, with the same programs that Blue Cross and Blue Shield of Minnesota for the same period of time?

A. The comparisons I made in my research were on the national level, because I see Blue Cross as one insurance company in a national industry. I see the wellness programs as a national phenomenon, not as a State-of-Minnesota phenomenon.

And so on the basis of the -- the process, the historical process for the evolution of those wellness programs in the insurance industry, and in other businesses, as well, I was exploring them on a national basis, rather than narrowly on a

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State-of-Minnesota basis.

Q. So it is a fair statement of mine, that you cannot compare in Minnesota traditional health-care health insurers with Blue Cross and Blue Shield of Minnesota, to determine the extent to which they pursued wellness programs involving, in particular, smoking, throughout the 1980s and 1990s; is that correct?

MR. LINDSAY: Objection.

THE WITNESS: I did not make that specific Minnesota-based comparison the focus of my research, for the reasons I just indicated.

BY MS. NELSON:

Q. Turning then, Mr. Green, for a moment to your report, and I want to talk a little bit more about your --

MR. LINDSAY: Susan, before you begin your next question, I note that it's 10:52 --

MS. NELSON: 11:25.

MR. LINDSAY: I'm sorry, I'm misreading.

BY MS. NELSON:

Q. I want to turn for a moment to your report and talk a moment about gaining a clear definition of what you are here to opine about and what you are not here to opine about.

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As I understand it, and we talked about this yesterday, you are not offering opinions as a legal expert on the question of how the law imputes knowledge to a corporation or entity; is that correct?

A. I'm not here to offer opinions as a legal expert on any question, including that one.

Q. And I understand, Mr. Green, that you are not here to offer an expert opinion in this litigation regarding the knowledge of the smoking citizens of Minnesota with respect to the health effects of tobacco and the addictiveness of nicotine over the course of the past several decades?

A. That was not the subject of my research. The general public knowledge of citizens of Minnesota was not the subject of my research.

Q. And as I understand it, Mr. Green, you are not offering expert opinions as to whether the documents produced in this litigation by the cigarette industry reveal information on the health effects of tobacco that was not previously known in the public domain?

A. I'm not offering any opinions on that question.

Q. And as I understand it, Mr. Green, you are not offering opinions in this litigation as to whether the documents produced by the tobacco industry in

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this case reveal information regarding the addictiveness of nicotine that has not previously been known to the public?

MR. LINDSAY: Objection.

THE WITNESS: I am not offering opinions on that subject.

BY MS. NELSON:

Q. And as I understand it, Mr. Green, you are not offering expert opinions in this litigation as to whether the tobacco industry had information regarding the health effects of tobacco before it was known by the surgeon general of the United States?

MR. LINDSAY: Objection.

THE WITNESS: I'm not offering any opinions on that question.

BY MS. NELSON:

Q. And as I understand it, Mr. Green, you are not offering opinions in this case as to whether the tobacco industry had information regarding the addictiveness of nicotine before the surgeon general?

A. I'm not offering --

MR. LINDSAY: Objection.

THE WITNESS: -- opinion on that question.

BY MS. NELSON:

Q. Would you agree with me, Mr. Green, that the

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methods of historical inquiry that you utilized and testified about in Roman Numeral III of your report would be equally applicable to -- in a historical inquiry on the tobacco industry?

MR. LINDSAY: Objection.

THE WITNESS: Where are we? What part of the report?

BY MS. NELSON:

Q. Roman Numeral III, which begins on page one of your report, "Methods of Historical Inquiry."

A. Okay. Yes, these are general comments about the practices of the methods of business and economic historians and they would generally be applicable to research into any industry or businesses.

Q. Including the tobacco industry?

A. Yes.

Q. Would you agree with me, Mr. Green, that the Department of Commerce of the State of Minnesota has had as its charge -- one of its charges over the course of the past several decades, the regulation of Blue Cross and Blue Shield of Minnesota and enforcement of the laws --

A. Yes.

Q. -- which govern Blue Cross and Blue Shield of Minnesota; is that correct?

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A. Yes, I believe so.
Q. And in the course of your research are you aware of any instance in which the Department of Commerce has challenged Blue Cross's status as a nonprofit health service plan under the law?
A. I didn't investigate that question in primary research. I'm not aware of any such episode, other than the minor exchange of letters between Commissioner Hatch and President Czajkowski that arose in the mid '80s in connection with that employee committee, when Blue Cross was going smoke-free, or in the process of going smoke-free in its building.
Q. And that's the incident in your report we discussed yesterday?
A. Yes.
Q. Where you reported on the memo from the disgruntled employee and you reported on Mr. Hatch's reply, but you failed to report on Mr. Czajkowski's position on behalf of the company?
MR. LINDSAY: Objection.
THE WITNESS: It's the -- the letter from Mr. Hatch in that passage raises issues of Blue Cross remaining appropriately within its reserve boundaries and behaving appropriately as a for-profit, and asks

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Mr. Czajkowski to respond to those larger questions, which he did.

BY MS. NELSON:

Q. And that response and his position is not contained in your report?

MR. LINDSAY: Objection.

THE WITNESS: That's correct, because it wasn't relevant to the question I was discussing at the time.

BY MS. NELSON:

Q. And are you aware of any incident in which the Department of Commerce challenged Blue Cross's -- challenged Blue Cross and claimed that it was somehow not carrying out the mission that is stated under the law?

A. With that one exception I have not seen any others and have not sought to investigate the Department of Commerce records for that larger question, which is not the subject of my research.

Q. Are you aware of any instance in which the Department of Commerce challenged Blue Cross and accused them of operating in a manner similar to for-profit traditional health-care insurers?

A. I haven't investigated the inner actions between the Department of Commerce and Blue Cross around that

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broader legal question.
Q. That's a legal question, from the Department of Commerce?
A. They're a regulating body, enforcing presumably the law under which Blue Cross has its nonprofit status.
Q. Are you aware of any challenge to it by the actuaries who review the exclusions and provisions of the contracts or the Commissioner and any of the nonlegal personnel of the Department of Commerce?
A. I haven't investigated the regulatory activities of the Department of Commerce with respect to Blue Cross.
Q. And, indeed, the Department of Commerce has as its charge to keeping on top of whether or not Blue Cross is indeed following the law, don't they?
MR. LINDSAY: Objection.
THE WITNESS: They have the regulatory responsibility over Blue Cross.
BY MS. NELSON:
Q. And to insure that it's carrying out its mission, is that correct?
MR. LINDSAY: Objection.
THE WITNESS: That's probably too broad a statement.

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BY MS. NELSON:

Q. You don't think the Department of Commerce has as its responsibility to insure that Blue Cross is carrying out its mission under 62 C?

MR. LINDSAY: Objection.

THE WITNESS: I would imagine that their regulatory activities, which I haven't researched, as I just said, focus on compliance with particular features of the law and the nonprofit statute and operate more on that particular procedural level than on the level of global review of compliance --

BY MS. NELSON:

Q. You state that without any investigation whatsoever into the Department of Commerce's activities; is that correct?

A. I have not investigated their regulatory activities in general.

Q. Now, turning for a moment to the portion of your report which discusses the shift in rating from community rating to experience rating. Do you recall that?

A. Yes.

Q. Would you define for me the distinction between community rating and experience rating?

A. It's not on a relevant page of the report.

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MR. LINDSAY: Page five. ((Discussion had off the record.)

BY MS. NELSON:

Q. Are we on page five?

A. Uh-huh. Yes.

The language here says community rating means that insureds in a given community all pay the same rate regardless of any distinctive experiences or risk factors for their own group.

Q. Okay. What about experience review?

A. By contrast, experience rating is rating where the specific groups's insurance premium rate is based on distinctive experiences or risk factors for that specific group.

Q. And that's your understanding of the distinction?

A. That's a basic short description of it, yes.

Q. Had Blue Cross and Blue Shield of Minnesota continued to engage in community rating for its fully-insured group policies from 1977 to 1994 would it be in business today, sir?

MR. LINDSAY: Objection.

THE WITNESS: I think they shifted to experience rating under competitive pressure long before 1977.

BY MS. NELSON:

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Q. But I'm talking about the period of damages in this case. Isn't it true that Blue Cross and Blue Shield could not have remained solvent for that time period had they engaged exclusively in community rating?

MR. LINDSAY: Objection.

THE WITNESS: Unless all insurance companies in the market were, by law, or in some other way pressed to adopt community rating, it would be difficult for one company to survive financially, practicing community rating in an environment where others would be practicing experience rating.

BY MS. NELSON:

Q. Now at the bottom of page five you state that Blue Cross had "...largely abandoned its community rating program (which had made health care more affordable to higher risk members of the community)." And then you state, "It is difficult to reconcile these historical facts with BCBSM's current claims to be promoting wider and more economical availability of health-care services," closed quote.

Did I read that correctly?

A. Yes.

Q. So if I understand what you're saying, you're saying that had Blue Cross continued to engage in

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community rating, it would be promoting wider and more economically available health-care services, but its shift to experience rating is an example of an instance in which Blue Cross is acting in a manner not consistent with that mission; is that what you're saying?

MR. LINDSAY: Objection.

THE WITNESS: The shift to experience rating raises the cost of coverage for some groups of subscribers. And presumably excludes some groups of subscribers or potential subscribers from coverage, who might have been covered under a community-rating system.

BY MS. NELSON:

Q. So that if I understand what you're saying then, increasing premium rates for certain groups of subscribers, or excluding certain groups of subscribers, in your view is inconsistent with Blue Cross's legal mission to provide wider and more economical availability of health-care services; is that what you're saying?

MR. LINDSAY: Objection.

THE WITNESS: To the extent that they narrow their customer base, or make the coverage less economically available to some subset of their

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customers, that seems to me to depart from this broad goal as stated here--wider and more economical availability of health-care services.

BY MS. NELSON:

Q. So wouldn't you agree with me then, that had Blue Cross made a decision to exclude health-care coverage for smokers, with respect to smoking-related diseases, that would be a departure from its mission to provide a wider and more economical availability of health-care services?

MR. LINDSAY: Objection.

THE WITNESS: Would you repeat the question?

MS. NELSON: Sure.

Let's read it back.

(Record read.)

THE WITNESS: That's a hypothetical question. They did not systematically exclude all smokers from coverage. They did provide a discount to nonsmokers and in the pricing of that dual system, one of the consequences of that in group policies was that smokers would end up paying a higher cost than if they were pooled together with nonsmokers.

Q. Okay. Let's --

A. But smokers, as a category of subscribers, were not systematically excluded.

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Q. I would agree that didn't happen and that's not my question.

What you just said was -- what you just testified to was that if Blue Cross excluded groups of subscribers from coverage, or increased their health-care costs, that is a departure from the mission stated here; is that correct?

MR. LINDSAY: Objection.

THE WITNESS: I believe I said something similar to that. That if by shifting to experience rating and thereby rating some groups higher in premium charges, and perhaps choosing not to insure others, they were departing from the maximum wide and most economical availability of health-care services, yes.

BY MS. NELSON:

Q. So would you agree with me, then, that had Blue Cross -- they didn't -- but had they excluded smokers, all of their smoking subscribers from coverage, for smoking-related diseases, that that would be an example of a departure from their mission?

MR. LINDSAY: Objection.

THE WITNESS: It would be a narrowing of their provision of health services to -- excluding a portion of the Minnesota population.

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BY MS. NELSON:

Q. And, therefore, departing from their mission; correct?

MR. LINDSAY: Objection.

THE WITNESS: I suppose so.

BY MS. NELSON:

Q. And wouldn't you agree with me that in your view, at least, the implementation of a differential premium, which raises health-care costs to the smokers in Minnesota -- that is another example, as you've testified to, of a departure from this mission?

MR. LINDSAY: Objection.

BY MS. NELSON:

Q. Taking a group of people and raising their health-care costs?

MR. LINDSAY: Objection.

THE WITNESS: I think the consequence of the smoker discount policies was to raise the effective premium costs for smokers, at least in some instances. In other instances they may have kept the base rate the same and merely offered the discount to the nonsmokers.

BY MS. NELSON:

Q. And where the smokers had an increase above the

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base rate, wouldn't you agree with me, that that is an example in your view of a departure from Blue Cross's mission?

MR. LINDSAY: Objection.

THE WITNESS: It makes the health coverage less economical for those individuals.

BY MS. NELSON:

Q. And, therefore, a departure from the mission that you've previously testified to, correct, Mr. Green?

MR. LINDSAY: Objection.

THE WITNESS: I'm having a problem with the phrase "Departure from the mission." It less than fully fulfills the mission. I'm not trying to deliver a legal opinion about whether they are violating the law by any such activity.

BY MS. NELSON:

Q. I'm not asking --

A. Because I'm not a legal expert. But it seems to me if the mission is to provide the widest and most economical availability, that that is less than perfectly fulfilled when costs are raised to subsets of the Minnesota population, or when subsets of that population are excluded from health-care services.

Q. And an example of that are -- would be when

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costs are raised for smoker subscribers of Blue Cross?

A. That would be one such example.

Q. Thank you.

Okay. Let's go back to the documents. And get your pile starting with 3042.

A. (Complying.)

Q. Mr. Green, looking at document thirty -- the document which has been marked as 3042, and appears to be a search of the Magazine Index Plus database on the subject of Blue Cross and Blue Shield Association at the University of Minnesota Library. First of all, would you agree that I have accurately described the document?

A. That appears to be a portion of that search, yes.

Q. And it appears that the identity of four articles appears on this document; is that correct?

A. Yes.

Q. And that the text for those articles is not attached; is that correct?

A. Correct.

Q. Nor is there an abstract?

A. Correct.

Q. Who prepared this document?

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A. Kate Thomas, at my request.
Q. Have you reviewed the underlying documents?
A. No.
Q. Did you rely on this document?
A. I don't believe so.
Q. 3043 is a two-page document which appears to be a search from the Magazine Index Plus database on the subject of the Empire Blue Cross and Blue Shield at the University of Minnesota Library; is that a fair and accurate description of the document?
A. Yes.
Q. And the Empire Blue Cross and Blue Shield is the Blue Cross and Blue Shield of New York State; is that correct?
A. Correct.
Q. This is a series of the identity of articles apparently on the New York State Blue Cross and Blue Shield association; is that correct?
A. It appears to be that, yes.
Q. Did you prepare this document?
A. This was prepared by Kate Thomas at my request.
Q. Have you reviewed the underlying articles?
A. No.
Q. Did you rely on this document?
A. No.

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Q. 3044, a single-page document, appears to be a search of the Magazine Index Plus Backfile Database on the subject of Blue Cross and Blue Shield Association, from the University of Minnesota Library; is that correct?

A. Yes.

Q. It identifies a single article by title; is that correct?

A. Yes.

Q. Who prepared this document?

A. Kate Thomas at my request.

Q. Have you reviewed the underlying article?

A. No.

Q. Are you relying on this document?

A. No.

Q. The document which has been marked as Exhibit 3045 is a two-page document, appears to be a search from the Magazine Index Plus Backfile database. And the subject of Blue Cross and Blue Shield Association at the University of Minnesota Library; is that an accurate description of the document?

A. Yes.

Q. And does that document list the title of a number of articles?

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A. Yes.
Q. Who prepared this document?
A. Kate Thomas, at my request.
Q. Have you reviewed the underlying articles?
A. I don't believe so. The only exception might be if they appeared more fully in other database searches where the full text was provided.
As far as I notice in glancing through the list, that doesn't seem to be the case.
Q. Are you relying on this document?
A. No.
Q. Tell you what: Why don't you look through what's been marked as 3046 through 3055 and tell me which of those, if any, you are relying on. Shorten this up a bit.
MS. NELSON: Why don't we go off the record for a minute?
(Discussion had off the record.)
(Luncheon recess taken.)
MS. NELSON: Now we can on the record.
Mr. Lindsay, I understand that over the lunch hour you had an opportunity to speak with some folks on your side of the case to respond to the issues I raised when we first went on the record this morning.

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MR. LINDSAY: Let me respond to the statement that you made this morning.

First of all, I should note that I am simply trying to make sure that whatever agreement is to govern these proceedings is truly bilateral. And I will note that defendants have been attempting to negotiate with plaintiffs an expert deposition protocol since at least July 11, when John Monica of the Shook Hardy Law Firm, sent a proposed expert deposition protocol, I believe to Roberta Walburn. Ms. Walburn apparently did not respond until August 4th. Mr. Monica replied, in turn, on August 7th. And as of August 26th he had apparently not heard back from her.

You have raised in your statement a number of issues, and I hope that I have taken them down correctly.

Let me tell you what it is that I am prepared to permit this witness to respond to.

And I should also state, you know, again, that my concern has nothing to do with anything this witness may or may not say. It has to do with establishing a fair and mutual procedure in this matter.

Having said that, I believe that the areas into

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which I will permit inquiry are as to what I will call the -- and I believe you used the word this morning, as well, logistical details of whether the witness has met with counsel, how many times, for how long, who was present. And I believe that would cover that. You have stated this morning that there would be no inquiry into substantive communications.

MS. NELSON: Could I ask for a clarification? Is that in connection with the deposition? In connection with the work he's done for the tobacco industry? Or both?

MR. LINDSAY: If you're asking whether it is in connection with meeting specifically that you might deem as preparation for the deposition, as opposed to meetings that this witness has otherwise had with counsel, then I am going to permit the witness to answer as to both. I don't know that it particularly makes a difference, whether -- you know, what the next detail is.

And the only other area I believe to be addressed here is with respect to documents that this witness has relied upon and specifically the requirements of 2A1E. It should be clear that I have permitted free inquiry into what documents the witness has reviewed. And although it is apparent

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that -- I shouldn't say it is apparent -- it appears that there may be a difference of understanding as to what rely means between you, Ms. Nelson, and this witness, I have certainly not attempted to preclude you from examining the documentary bases of his opinion. I believe that we have already fully complied with the order, in that regard. But if there are additional inquiries as to what documents the witness has reviewed, or drawn upon, I believe is his word, you certainly are free to inquire in that area.

MS. NELSON: But the listing doesn't have to have them? I'm free to ask about them, but the listening doesn't have to have them?

MR. LINDSAY: I would say I believe we have complied with the order.

MS. NELSON: You haven't told me what you think the order means. In other words, do you think the order requires a comprehensive list of the documents relied upon, or the principal documents?

MR. LINDSAY: I have told you that I believe we have complied with the order, with respect to the specific facts that you have already elicited from this witness, and that is what I'm prepared to state at this time.

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MS. NELSON: I'm still confused about what you're going to argue to the judge. Because the record that this witness has stated, is that to the extent that there are duplicative documents that support his opinions, they're not on the list. So if they're not on the list, I guess I'm wondering why you're permitting that. And is the reason that you're permitting that because you don't think they're principal documents?

MR. LINDSAY: I'm permitting that because I'm not precluding you from inquiring into that area.

MS. NELSON: Yes. But I'm talking about a physical listing.

MR. LINDSAY: Whether it is something that was to have been -- that was required to have been placed upon a list or not, I am permitting you to inquire into the area. I don't know that anything more is to be gained at this point by my telling you anything beyond that.

MS. NELSON: Well, this witness is unprepared. He can't tell me -- I mean I will. I'll say I want --

MR. LINDSAY: This witness is prepared.

MS. NELSON: Then he'll have to identify for me all of the documents, duplicative or not, that are

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not on this list. Is he prepared to do that today? I'll ask him.

MR. LINDSAY: You may ask whatever questions you wish to ask.

MS. NELSON: Okay. But if he is not prepared to do that, then you see that my view is that we have been prejudiced. That's why it was supposed to be on the list. And if he says to me today, "Oh, there's lots of documents, I couldn't possibly tell you their identity, and they're duplicative," as he told me so many times yesterday, or additionally supportive of his opinion, then through inquiry and through the list I have been unable to ascertain that. And that's a problem.

And you see, if that continues to be the case, our witnesses will do the same. We will give them volumes of documents, we will give you a listing that is illustrative, as he has done of those documents. When you ask our witnesses to identify each and every document, they'll say what he's going to say, "Couldn't possibly do that."

I mean if that's the bilateral agreement you want, that's the bilateral agreement you want.

MR. LINDSAY: I told you --

MS. NELSON: We're willing to do that.

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MR. LINDSAY: -- that I believe defendants have been trying to enter into a bilateral agreement since early to mid July.

MS. NELSON: Not on this topic. Absolutely not. There is a court order on this topic.

The protocol that you're talking about has to do with items not in the court order. Now we're faced with a court order that we have complied with. We have given you a comprehensive listing of all documents relied on, whether or not they are duplicative of other documents. We have not given you a listing of illustrative documents. We have not done that.

Your giving me freedom to inquire of this witness won't advance the ball one iota. Watch. I'll do it.

Now, that's fine, if that's how it's going to occur with our witnesses. We now have four or five months till trial. We will give them all manner of documents to assist them in researching and supporting their opinions. We will give you an illustrative listing. And when you ask them -- and we will give you free inquiry at the deposition. And I doubt that any of them can identify by Bates number, or even topic matter, what each of those

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documents are.

So we have to resolve this problem. It is a big problem.

MR. LINDSAY: First of all, I'm not certain that I agree with you that it is a big problem, or is a problem at all.

Second, I am by no means opposed to resolving problems. I believe that that is what counsel obviously should attempt to do through the Meet and Confer process.

What I'm saying is what we can do today, we are going to do today.

MS. NELSON: That's fine. And if through the Meet and Confer process the identity of additional documents are disclosed, we will obviously have to come back and continue the deposition. We cannot be precluded from asking questions of this witness. It is so fundamental to expert depositions that you're entitled to know what an expert relies on. There's nothing more fundamental. And we're entitled in the expert deposition to inquire about it. And if the listing, nor the witness orally, can identify those documents, how on earth can we do that, Mr. Lindsay?

MR. LINDSAY: Are you finished now with your statement?

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MS. NELSON: Yes.

MR. LINDSAY: Let's move on then to the second topic. You asked us, if we would -- in order to expedite this deposition if we would spend the lunch hour reviewing a stack of documents, some of which have been marked as deposition exhibits and some of which have not yet been so marked, but I understand will be marked in a few moments.

The witness has -- and you asked us specifically whether the witness would be reviewing these in order to determine whether they are documents that he is relying upon.

I've already made my statement as to the difference of understanding between yourself and this witness, as to what exactly you mean by rely upon. And I will object to the question on that basis and I understand from our colloquy off the record that you agree that I have a continuing objection for purposes of these documents.

Having said that, the witness has set aside one exhibit, as to which you may wish to inquire, and then as to the others I think you may wish to make a general inquiry.

MS. NELSON: The only comment I would have on that is that the group of exhibits that I provided to

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the witness to review were the exhibits that were attached to his expert report. They were exhibits that he provided to us. It appeared, going through some of those exhibits before the lunch hour that there were a number of them that he wasn't relying upon in connection with forming his expert opinions in this case; and, therefore, to expedite this matter, I thought perhaps he could identify the other exhibits that he had provided to us, that he is not relying upon.

Anything further?

MR. LINDSAY: I believe that covers it.

MS. NELSON: Well, you haven't talked about drafts. Did you address that issue with your co-counsel?

MR. LINDSAY: That's an issue that I don't believe that I can permit this witness to respond to further at this time because I believe we need to develop a truly bilateral agreement.

MS. NELSON: Is it your position that we have not permitted that inquiry of our experts?

MR. LINDSAY: I stated the position that I wish to state at this point.

MS. NELSON: Well, what opportunity then, once we've developed the so-called protocol, will I have

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to ask the questions of Mr. Green?

MR. LINDSAY: If the -- well, since I don't know what the protocol will state when it is agreed upon, I can't speculate as to exactly what will happen. But if it is a truly bilateral agreement, then I would expect that the parties would then make appropriate agreements as to what steps need to be taken to implement it.

MS. NELSON: Well, the difficulty is that we're at the end of the deposition period for the plaintiffs' experts. So it's strange to talk about a protocol when we've completed that entire process.

MR. LINDSAY: Actually what is strange is that we attempted to get this resolved at the beginning and in advance of the plaintiffs' deposition and the plaintiffs' deposition -- excuse me -- experts of plaintiffs' depositions. We have been unable to get such agreement with the plaintiffs and now, when it is the plaintiffs' turn to take depositions of defendants' experts, suddenly now they want clarification and indeed want to press into such areas. If plaintiffs wished to have done that, then it was their responsibility to attempt to enter into a protocol in advance of the depositions.

MS. NELSON: No. No. You misunderstand what

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our position was. Our position was there was no need for protocol because the rules of the State of Minnesota provide how to handle yourselves in these depositions. There's law with respect to when it is appropriate to object on the basis of work product and when it is not. And we have a court order providing a protocol. It is our view that there was no need for any additional clarification. The rules on work product, in addition to the court order, define the protocol. We had a protocol. It wasn't that we were refusing or ignoring your efforts to come up with some additional protocol. It was our position, as in most cases, court orders and Rules of Civil Procedure should govern. So there is a protocol in place and has been in place. And under that protocol and under the Rules of Civil Procedure we permitted the inquiry into, for instance, the issue of drafts. Of all those experts. And now, at the point in time in which we are asking them, you are prohibiting them. There is a protocol in place. It is the law and the court orders. And the law and the court's orders do not permit you to direct this witness to answer those -- not to answer those questions.

MR. LINDSAY: I disagree that there is a

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protocol in place, or at least the one that you have described as protocol is a protocol. But I don't wish to be arguing over semantics at this point.

MS. NELSON: So I think you're at great risk here for directing this witness not to answer. Because there is nothing to talk about any more. We have the end of a deposition period and we had a protocol in place. And under that protocol, whether you want to call it protocol or the way in which we conducted ourselves, or whatever you want to call it, these questions were permitted.

MR. LINDSAY: Could you please provide me a copy of this protocol?

MS. NELSON: It's the Rules of Civil Procedure, and the court order. That's what it is.

MR. LINDSAY: I don't think there's anything further for us to be gained by your and my making further statements on this record.

MS. NELSON: One question.

MR. LINDSAY: Sure.

MS. NELSON: Do you believe that your directing the witness not to answer the questions on drafts is permissible under the Rules of Civil Procedure on work product and court orders in this case?

MR. LINDSAY: I have stated my position that

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unless and until we can arrive at a bilateral agreement that the parties have indeed agreed upon, that it is proper for me not to permit inquiry of this witness on that topic.

MS. NELSON: Well, if we have permitted you to inquire into these areas, in all of our depositions, what are you missing? What -- bilateral, then, simply permits us the right to do it. I don't understand what we would talk about.

Let's suppose we came to that Meet and Confer on this particular topic. We've already had all those depositions and we've already permitted your counsel to fully inquire of all our witnesses on those topics. If that's going to be bilateral, then, the only possible conclusion is that we, too, have the right to do that.

MR. LINDSAY: And if that turns out to be the case, then indeed we will have to make appropriate arrangements.

MS. NELSON: You mean you're willing to bring Mr. Green back?

MR. LINDSAY: Meaning we will have to make appropriate arrangements.

MS. NELSON: What other arrangement could be fair, than my ability to ask the question of the

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witness --

MR. LINDSAY: Since I do not know whether your factual predicate is true, that such inquiries have in fact, quote, been permitted, closed quote, of all of your experts, I'm not going to say.

If you wish to tell me that you will also reproduce all your witnesses in the event such inquiries were not actually made and responses permitted, then we might be able to talk about something. But --

MS. NELSON: Little did I know that I had to do an analysis of all the expert depositions and bring them all here today.

I think what's really the problem here, Mr. Lindsay, is that somebody on your side needs to advise all counsel present at these depositions what questions have been permitted and what hasn't, and apparently that hasn't occurred in this regard. Because had that occurred, we wouldn't be having this discussion.

In any event, I will ask the questions on direct; you can direct the witness not to answer if that's what you think is appropriate, but I will be seeking sanctions for that, I will be seeking costs of additional depositions.

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But let's proceed.

BY MS. NELSON:

Q. Mr. Green, how many drafts of your expert report were prepared? I just want a number.

MR. LINDSAY: I'm going to instruct the witness not to answer that question.

MS. NELSON: On what basis?

MR. LINDSAY: I believe we've now spent ten minutes talking about that, counsel. I'm not going to state the entirety of our colloquy.

MS. NELSON: But I want to know the legal basis, not --

MR. LINDSAY: I've stated the basis.

MS. NELSON: Is the legal basis work product?

THE WITNESS: I've stated the basis, counsel.

MS. NELSON: No, you haven't. You've talked about how you're uncertain about bilateral agreements and protocols.

I want to know the legal basis. Because the only basis to instruct a witness not to answer a question under court order is privilege.

MR. LINDSAY: I have stated the basis, counsel.

MS. NELSON: Are you refusing to tell me whether you are instructing this witness not to answer the question on the basis of privilege?

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MR. LINDSAY: I am telling you that there has already been a lengthy colloquy just this moment, at which both you and I were present, and I have stated our position, and I have stated the basis for our position.

MS. NELSON: Okay. It appears that the basis for Mr. Lindsay's position is the colloquy, which had to do with the absence of a bilateral expert protocol, as opposed to the legal basis of privilege. On that grounds, I am making a record that Mr. Lindsay is clearly in violation of the court order which permits a witness to be instructed not to answer strictly and exclusively on the basis of privilege.

MR. LINDSAY: Make whichever interpretations of our colloquy you may choose to make. The fact stands that we have that colloquy.

BY MS. NELSON:

Q. Where are the drafts of your expert report as we sit here today, Mr. Green?

MR. LINDSAY: Same instruction.

MS. NELSON: Same position on the record, that apparently this witness is being instructed not to answer on the basis of privilege.

MR. LINDSAY: Same responsive comment.

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BY MS. NELSON:

Q. Were your drafts provided to counsel?

MR. LINDSAY: Same instruction, comment.

And in fact, Susan, if you just wish to state the questions, I think we can speed this up, because I will make the same comment in response to each of them.

BY MS. NELSON:

Q. Were substantive changes made by counsel? Yes or no.

MR. LINDSAY: Same.

BY MS. NELSON:

Q. Did you rewrite the report incorporating counsel's substantive changes? Yes or no?

MR. LINDSAY: Same.

MS. NELSON: With respect to all of those questions, which were answered in full by our experts, we take the position that Mr. Green should come back, at a cost to the defendants, to answer those questions. And that this should be the subject of sanctions, since he is instructing the witness not to answer, on the basis other than privilege.

BY MS. NELSON:

Q. Now, moving ahead to your preparation of your -- for your deposition today. I'm not talking about the

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work you did on the report, Mr. Green. I am talking about your notification of the date of your deposition and the meetings that took place at that -- after that point in time.

When did you first learn -- when, just by date, did you first learn that you were going to be deposed in this case?

MR. LINDSAY: Are you asking when he learned of a specific date?

MS. NELSON: Yes.

MR. LINDSAY: Okay.

You may answer.

THE WITNESS: I believe in late June, 1997.

BY MS. NELSON:

Q. Have you met with counsel since the time they notified you of that date?

MR. LINDSAY: You may answer.

THE WITNESS: Yes.

BY MS. NELSON:

Q. On how many occasions?

A. Two, I believe.

Q. And who was present at those meetings?

A. Myself and Michael Lindsay.

Q. At both of those meetings?

A. Yes.

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Q. Was anybody else present?
A. No.
Q. Have you met with anybody other than Mr. Lindsay to prepare for your deposition? Yes or no?
MR. LINDSAY: Are you asking if he's met with anyone --
MS. NELSON: Other than you, since the time that he learned of the dates of his deposition.
MR. LINDSAY: Other counsel, you mean?
MS. NELSON: Other counsel, experts. Defendants. Anybody.
THE WITNESS: I think I've had one or two conversations with Kate Thomas, my research assistant. Other than that, I have had no meetings.
BY MS. NELSON:
Q. Okay. Were you asked to review any documents in preparation for the deposition today?
MR. LINDSAY: That, I believe, is a substantive question which you have said you do not agree that communications may be made into on the grounds of work product.
MS. NELSON: Well, okay. Let me ask it a different way.
BY MS. NELSON:
Q. Did you review the documents predesignated for

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this deposition?

MR. LINDSAY: You may answer.

THE WITNESS: I think so. I reviewed a stack of documents that were predesignated. I think all of them. I'm not certain that it was all of the documents, but I believe so.

BY MS. NELSON:

Q. Did you review any documents in preparation for this deposition that were not predesignated and/or not part of the expert production that you made in this case?

A. No.

Q. Now I believe yesterday you testified that you spent about fifteen hours preparing for the deposition; is that a fair statement?

A. Uh-huh. Yes.

Q. Now I want to talk for a moment about meetings you had with counsel or others in preparation of your report in this case. You established that you have two research assistants and presumably you had a number of meetings with them; is that true?

A. Yes.

Q. Other than your two research assistants, did you meet with anybody, including counsel, in connection with the preparation of your report?

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A. Yes.
Q. Who did you meet with?
A. I met on four or five occasions with Mr. Lindsay. At some of those meetings other counsel were present.

I met on one occasion with Professor Hyman Berman, a colleague of my in the History Department, who is also an expert witness in this case. And with my two research assistants and his research assistant, David Ryden, and another research assistant, Michael Zis, for the purpose of comparing our coverage of research materials.

It turned out that Michael Zis had done some work in Minnesota legislative documents that overlapped with the work that Kate Thomas was doing.
Q. Did you rely in your report on any of the research done by Dr. Berman or his research assistants?

MR. LINDSAY: Objection.

BY MS. NELSON:
Q. You may answer the question.
A. I'm not sure which of the legislative committee hearing documents that we reviewed yesterday Kate obtained of her own initiative and which she obtained through Michael Zis. They had overlapping work in

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that area. I received the documents from her she judged relevant to our inquiry.

Q. Would it be fair to say that I have received copies of any documents you've relied upon that may have been provided to you through Dr. Berman and/or his research assistants?

A. None were provided to me from Dr. Berman. The ones that may have been provided to Kate Thomas from Michael Zis you have received. Anything that I received, you have received.

Q. Did you and Dr. Berman have a discussion outside of the presence of counsel?

A. Well, we're colleagues in the History Department, so we frequently have conversations, but we've not talked about our research findings or opinions in this case.

Q. You've never talked about them with each other?

A. Just the general fact that we're both involved, but not about the substance of our research or our conclusions or opinions.

Q. I thought you mentioned that there was an occasion on which you and your research assistants, and Dr. Berman and his research assistants, got together for a meeting; is that right?

A. Yes.

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Q. And was counsel present at that?
A. Oh no.
Q. Okay. Can you tell me what you discussed with Dr. Berman at that meeting?
A. The -- the six of us -- each of us, and our two research assistants, discussed sources, in an area where we discovered an overlap of our efforts.
Q. And where did you discover an overlap of your efforts?
A. In the legislative hearings relating to smoking and health.
Q. And what discussions did you have about that?
A. The fact that the sources -- that two -- each of us had a research assistant working in this area. And that they should avoid duplication of effort. And that if Michael had already done some work, he was further along in the process than Kate was at that time, that she could look through the documents that he collected and select some that might be relevant to the issues that she was investigating with me.
Q. Now, do you have an understanding, as you sit here today, as to the area in which Dr. Berman intends to testify?
A. I have in recent weeks read his report.

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Q. Have you read the reports of any other experts in the case?
A. Ed Foster. And another person whose name I don't know, who is an insurance expert. It is a very short report.
Q. Did you read the report of Mr. Brown?
A. I don't know if that's the person's name or not.
Q. The report on differential premiums?
A. That sounds like we're talking about the same one. It was maybe a ten-page report. Something fairly short.
Q. Do you recall what Mr. Brown's conclusions were?
A. Not in any detail.
Q. How about generally?
A. That -- in general, that an insurance company could set differential rates so as to recover differential costs.
Q. Have you had any discussions with Mr. Brown in that regard?
A. I have not.
Q. Have you had any discussions with anybody about that opinion, apart from counsel?
A. I haven't discussed it with counsel, either. I haven't discussed it with anybody.
MS. NELSON: I tried, okay?

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MR. LINDSAY: (Nodding.)

BY MS. NELSON:

Q. So you have read the reports of Mr. Foster and Mr. Brown, is that true?

A. And Mr. Berman.

Q. And Mr. Berman. Okay.

What is your understanding of Dr. Berman's conclusions?

A. That material is a little more familiar and assimilable to a historian than some of your other material.

That, in general, Americans, and specifically Minnesotans, have been aware for many, many decades, of the health risks associated with smoking and tobacco. And have been aware or believed in the possibility of those risks and in the possibility of the habituating or addictive qualities of nicotine. It's a study of popular beliefs and attitudes, not of the scientific truth or merits of any of those beliefs.

Q. And yesterday I believe you testified that reasonable minds can differ as to whether or not smoking causes adverse health problems; is that correct?

MR. LINDSAY: Objection.

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THE WITNESS: That's an abbreviated version of what I think I said.

BY MS. NELSON:

Q. And I believe you also testified that reasonable minds could differ as to whether or not nicotine is physiologically addictive, as opposed to habit-forming?

MR. LINDSAY: Objection.

THE WITNESS: Yes.

BY MS. NELSON:

Q. Okay. And is that position consistent in your view with that of Dr. Berman's?

MR. LINDSAY: Objection.

THE WITNESS: You're asking me for my opinion on his opinion?

BY MS. NELSON:

Q. Well, he apparently portrays in a report that you both read and discussed with him, what you described as the popular beliefs about the health risks associated with smoking and tobacco; right?

MR. LINDSAY: Objection.

THE WITNESS: I did not discuss his report with him.

BY MS. NELSON:

Q. But you read --

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A. I read his report.
Q. You read his report.
Based upon your review of his report, do you believe that his conclusions about those popular beliefs are consistent with your testimony that reasonable minds can differ about whether smoking causes disease and about whether tobacco is -- nicotine is physiologically addictive versus habit-forming?
MR. LINDSAY: Objection.
THE WITNESS: I think we should let Professor Berman speak about his conclusions for himself.
BY MS. NELSON:
Q. He will.
I'm asking you whether your conclusions are consistent with what you read in his report?
MR. LINDSAY: Objection.
BY MS. NELSON:
Q. You can answer the question.
A. I didn't seek to assess the match or mismatch of our conclusions. I read his report. And I would -- I just gave you a summary of my impression of the gist of his report. But I don't want to put my words into his mouth as to what his conclusions are.

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Q. And I don't want --
A. So he can speak to his own conclusions.
Q. And I don't want you to do that either. And he will speak to his own conclusions. But you're the one that just testified that because he was a historian and this was a topic similar to yours, that this was something you could digest relatively easily.
A. Less technically difficult than reading the insurance experts' reports.
Q. Sure.
And so my question to you, simply is: Did you find any inconsistency in your position with his position? It's really a very straightforward question about your views, not his views.
MR. LINDSAY: Objection.
THE WITNESS: Again, you're asking me to specify his conclusions and I don't feel comfortable speaking for him in that regard. So for me to compare my conclusions with his, would be for me to compare A with question mark. His conclusions are his own.
BY MS. NELSON:
Q. Well, I'm not asking you for what he's going to testify. I'm asking you for his written conclusions. He wrote them down and you read them.

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And I'm wondering whether you noticed any inconsistency between your positions and his positions?

A. I didn't notice any opinions expressed in my report that were at odds with opinions expressed in his report on the very limited areas where the two overlapped.

Q. And do you notice any inconsistencies between the testimony that you've given yesterday and today and his report?

MR. LINDSAY: Objection.

THE WITNESS: I think I'm being asked to compare a personal belief, which I expressed yesterday, with the opinions of an expert witness, Professor Berman. And those are not on the same footing.

BY MS. NELSON:

Q. Okay. That's not what I'm really asking you.

A. I have the personal belief that there's some uncertainty, I can't put a number to it, as to the causal relationship between smoking and various health risks. That's a personal belief, as I said yesterday.

Professor Berman in his report finds evidence of a great many people in America, and specifically in Minnesota, apparently having personal beliefs that

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there is a connection between -- an association and perhaps a causal connection, it varies from source to source, between smoking tobacco and various health risks.

Q. So he portrays popular beliefs on both sides of the coin?

MR. LINDSAY: Objection.

THE WITNESS: He can speak for his own conclusions again. I'd rather not do that for him.

BY MS. NELSON:

Q. Okay. Now, you testified, I think, that you met with Mr. Lindsay on five occasions; is that correct?

A. I think I said four or five. That's a guess.

Q. Four or five occasions?

A. I haven't kept count or looked back at my calendar to tally up the number, but that's a good approximation.

Q. And I believe you testified that at one or more of those occasions there were other counsel present; is that correct?

A. Yes.

Q. Which other counsel? You can identify them.

MR. LINDSAY: You may state the names, yes.

THE WITNESS: On one or two occasions Ed Magarian was present for part of the conversation.

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In my initial meeting, what I would call kind of orientation or get-acquainted meeting a year ago this summer, there were several attorneys present. Liza -- I can't tell you her last name, but I believe she's from Jones/Day, and I think Cleveland, but again I'm not sure. I think Bob Schwartzbauer was present. And one or two other attorneys, I think from other out-of-town firms. Maybe one from an in-town firm other than Dorsey and Whitney, but I don't have track of all the names. I met those people only once.

One of the later meetings involved both Magarian and Schwartzbauer for a period of time.

Schwartz- -- have I got that right?

BY MS. NELSON:

Q. Yes.

A. I have trouble remembering his name.

And then I made a presentation to a large group of lawyers early in winter of an early version of my report.

Q. Is that the winter of '96 - '97?

A. Yes. I think it was early '97.

Q. Where was that presentation made?

A. In Chicago.

Q. And how many lawyers were present?

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A. Eight or ten, I think.
Q. And were all of those lawyers working on the tobacco litigation in Minnesota?
A. I have no idea.
Q. You don't know?
A. Bob Schwartzbauer was the only person at the meeting -- well, Liza was in and out. She was sort of hostess for the meeting. Shepherding me in the waiting room and in and out of the meeting.

And I don't know the others or what firms they're from.

Q. Were they --
A. And which of them are involved in the Minnesota case or something else.
Q. Do you know whether they were even lawyers?
A. Oh, I think so. That was certainly my impression, as they went around the table. I think everybody gave a name and a company. A firm.
Q. Do you know whether all of those lawyers represented the tobacco industry?
A. I don't know that for sure, but that was my impression, that they were involved in that side of the case.

MS. NELSON: Can you represent to me, Mr. Lindsay, that all of those lawyers at this

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meeting that is being referred to now represented the tobacco industry?

MR. LINDSAY: They represented -- each of them represented a tobacco company, yes.

MS. NELSON: And that there was nobody else present in the room who didn't represent a tobacco company?

MR. LINDSAY: That's my understanding, as well, yes.

BY MS. NELSON:

Q. Have we now identified all of the meetings that you had with counsel or with others in preparation of your report?

A. I think so.

Q. When you made the presentation in Chicago did you use notes?

A. Yes.

Q. And do you have those notes?

A. No.

Q. When did you throw them out?

A. I essentially replaced them with later drafts of the report.

Q. Was it your practice to throw out drafts as you replace them?

A. Yes.

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Q. Did you have any drafts or notes at the time that you turned over your final report to Mr. Lindsay?

A. Just other copies of that report and the -- the notes, materials, et cetera, that you've been given, like the stack of documents.

Q. But there were no other notes or drafts that were not turned over to Mr. Lindsay?

A. Correct.

MR. LINDSAY: It should be clear, counsel, that I permitted the witness to answer questions concerning drafts.

MS. NELSON: Certain questions.

Are you still not permitting him to answer the other questions on drafts?

MR. LINDSAY: I'm not sure if there are other questions.

MS. NELSON: Okay. But the initial questions that I asked that you have objected to.

MR. LINDSAY: At some point perhaps we can take a break and I'll make sure I understand what they are. I was under the impression that I have permitted you to ask and the witness to answer.

MS. NELSON: Well, unless I've gone mad, which is indeed a possibility, I thought I asked the

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questions: How many drafts were prepared? Where are the drafts? Were the drafts provided to counsel? And the like. And that you have directed the witness not to answer those questions. Is that correct?

MR. LINDSAY: I won't respond to the question as to whether you're going mad, and I don't expect you wanted an answer to that.

MS. NELSON: Thank you. You can consider that rhetorical.

MR. LINDSAY: Yes.

I believe the witness has now testified that there were earlier drafts and that it was his practice to discard them.

MS. NELSON: Yes.

MR. LINDSAY: And I believe that that addresses one of your questions.

MS. NELSON: It does.

MR. LINDSAY: Okay.

MS. NELSON: It doesn't address all of the questions, though. Should I go back and ask them again?

MR. LINDSAY: No. I'll get them at the break.

BY MS. NELSON:

Q. Mr. Brown, --

MR. LINDSAY: Green.

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MR. NELSON: Mr. Green.

Off the record.

(Discussion had off the record.)

BY MS. NELSON:

Q. Would you get Exhibit 3005 in front of you, please?

MR. LINDSAY: 3005?

MS. NELSON: Yes.

Back on the record.

BY MS. NELSON:

Q. Mr. Green, let's take a look one more time at Exhibit 3005.

Would you agree with me that the Blue Cross and Blue Shield Minnesota documents that you have listed by Bates numbers, are those which you cite in your report?

MR. LINDSAY: Objection. Could you --

MS. NELSON: That might not be clear.

MR. LINDSAY: Yeah.

BY MS. NELSON:

Q. The first part of the -- the first page of Exhibit 3005 lists a group of BCBSM documents by Bates numbers; is that correct?

A. Yes.

Q. And that list represents all of the BCBSM

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documents that are referenced and so footnoted in your report; is that correct?

A. With the exception that I think we discussed yesterday, of the Company History.

Q. Okay.

A. Which was accidentally omitted from this list.

MR. LINDSAY: Actually, counsel, I may be mistaken, but the Fletcher history may also have been cited in the report. And I don't know whether that is --

THE WITNESS: I'm not sure whether that has Bates numbers or not. I read it as a book and accidentally omitted it from the list of books at the back.

BY MS. NELSON:

Q. So both the Fletcher and the Anderson histories are not reflected on Exhibit 3005, am I right? In any place?

A. The Anderson history is listed.

Q. The Anderson history is listed?

A. Top of the last page.

Q. Okay. So the Anderson history is listed. The Fletcher history is missing.

MR. LINDSAY: The witness testified --

THE WITNESS: It's in my footnotes in my report,

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but I accidentally omitted it from the list of books in the back from this 3005 list.

BY MS. NELSON:

Q. But it's nowhere on 3005?

A. That's correct. It was accidentally omitted from the list of books, unless it's included in the Bates numbers, and I don't remember whether that's the case. I think not.

Q. It is not -- the Bates numbers for the Blue Cross and Blue Shield history, which was produced to the document depository, is not present --

A. That's not Fletcher. That's a different volume we're talking about now.

Q. We're talking about this book (indicating).

A. That's not Fletcher.

Q. But this book --

A. This book, I agree, is listed and in footnote five, referred to by its Bates numbers, but was accidentally omitted from the roster of Bates numbers in this document 3005.

Q. Okay.

MS. NELSON: And this book, for the record, is BCBS 00026607 through BCBS 00026752.

Now, --

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A. I think we also found two journals that were accidentally omitted from the list of journals on the first page of 3005, but were included and listed in the table of contents and discussed in the body of the report.

Q. Correct.

Now, focusing for a moment strictly on documents. BCBSM documents from the depository, which have Bates numbers on them.

It is my understanding that you reviewed more documents than are identified on Exhibit 3005; is that correct?

A. Yes.

Q. And it's my understanding that some of those documents that you reviewed you relied upon in preparation of your report, but because they were duplicative of documents you do list on 3005, you did not include them; is that a fair statement?

MR. LINDSAY: Objection.

THE WITNESS: We had a discussion yesterday at considerable length --

BY MS. NELSON:

Q. Yes, we did.

A. -- about our differing understandings of the word relied upon.

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Q. Yes, we did.

Can you answer that question for me?

MR. LINDSAY: Same objection.

THE WITNESS: Do you want me to make a statement? Or do you want to repeat your question and have me answer?

BY MS. NELSON:

Q. What you told me yesterday so carefully was that you had reviewed all these many documents and what you did is you selected those documents that were evidentiary, that's the word you used, of your opinions and your report, but there were lots of others that you reviewed and that you know sitting here today would also be supportive of those opinions; right?

MR. LINDSAY: Objection.

THE WITNESS: There were additional documents in the larger body of documents that I reviewed, which might also additionally support the conclusions that I reached. I cited what I viewed as a sufficient number of these documents in the report, and listed all those that I specifically referenced in this document 3005 list.

BY MS. NELSON:

Q. Okay. Now, I want to know the identity of the

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documents that you didn't list. You've just told me that there were others that would support your opinions that you -- you identified -- I believe the word you used were those sufficient to support your opinions on Exhibit 3005. And I want to know the identity, by Bates number, of the other documents which you believe support your opinions.

MR. LINDSAY: Objection.

THE WITNESS: I can't provide you with a list of specific numbers and documents today. It's a body of documents in that larger body of documents that I reviewed.

BY MS. NELSON:

Q. And you're unable to provide me with the identity of them today, aren't you?

A. Yes.

Q. Okay. I want you to turn to page seventeen of your report for a moment.

A. (Complying.)

Q. The last full paragraph begins with the words, "It was not just CEO" -- do you see where I am?

A. Uh-huh. Yes.

Q. Now in that paragraph you state, as follows: "One BCBSM employee observed that, 'the hazards of health from smoking have been demonstrated

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in research going back thirty years.'" And you've identified that document by Bates number as (00094986); is that correct?

A. Yes.

Q. Then you state, "Similarly, this employee was aware that, quote, 'Smoking is an addiction,'" you have it all in caps, closed quote. And then you state the Bates number 00094990, "capitals in the original"; am I correct so far?

A. Yes.

Q. Then you say, "Indeed, this employee realized that smoking encompasses classic behaviors common to other chemical dependencies," closed quote, and you cite the same document; is that correct?

A. Yes.

Q. Then you state, "The employee characterized these observations as, quote, 'hard facts,'" closed quote. And you cite 00094986. Have I correctly stated what you wrote in your report?

A. Yes.

Q. Now in your -- then you have a footnote twenty-eight; is that correct?

A. Yes.

Q. And in your footnote you say, "The author of this document is not identified, nor does the

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document bear a date. Internal references suggest that this document (which was found in BCBSM files and was produced in this matter) is a BCBSM document dating from the mid 1980s"; have I read that correctly?

A. Yes.

Q. And what internal references were you talking about?

MR. LINDSAY: Do you wish to place the document in front of the witness? Or are you asking him for his recollection?

MS. NELSON: I'll pull it out in a minute.

THE WITNESS: I'd appreciate looking at the document.

BY MS. NELSON:

Q. Let me just ask you this before I pull the document out: Were you advised that the document in question indeed was not authored by a BCBSM employee?

A. No.

MS. NELSON: Why don't we go off the record a moment?

(Recess taken.)

(Exhibits 3056 - 3102 marked for identification.)

BY MS. NELSON:

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Q. Mr. Green, I would like you to review briefly documents in this case which have been identified and marked as 3046, 3047, 3048, 3049, 3050, 3051, 3052, 3053, 3054, and 3055, and determine for me, if you will, if you have relied on any of these documents in forming your opinions in this case?

MR. LINDSAY: Objection. But I'm not objecting as to the compound nature. I'm again objecting specifically with reference to the word rely on the basis of several prior colloquys.

THE WITNESS: The one document in that set which stands out from the others is 3054.

BY MS. NELSON:

Q. That's not going to do it.

The question is: Do I need to go through and ask you the entire --

MR. LINDSAY: Will you let him finish his answer?

BY MS. NELSON:

Q. I don't want you to tell me why. Because standing out from the other set is not the question. The question is --

A. Can we treat that one separately and treat the others as a cluster? Would that help?

Q. That would be fine.

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Okay. Let me ask you this question, then: Documents marked 3046 through 3055 -- have you relied in any fashion on these documents in forming your opinions?

MR. LINDSAY: I'm sorry.

THE WITNESS: With the exception of 3054?

MS. NELSON: With the exception of 3054.

MR. LINDSAY: 3046 through 3053, plus 3055, is what the question now pertains to?

MS. NELSON: That is correct.

THE WITNESS: No, I have not.

BY MS. NELSON:

Q. Okay. Now, have you relied on Exhibit 3054 in connection with forming your opinions?

MR. LINDSAY: Objection.

THE WITNESS: 3054 is an example of a document that relates to a small point made in the report, duplicative or redundant to another source, which I cited in the footnote, which I believe was Richard Niemiec's deposition, segment of that deposition, in which he discussed in part the subject matter which is in part discussed by this document; namely, joint activity between Blue Cross and Blue Shield of Minnesota and the Blue Cross and Blue Shield of Maine. I don't remember what its exact name is, a

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collaborative claims-processing project which those two entities involved themselves in. And I made a brief comment in the body of the report that Blue Cross and Blue Shield of Minnesota had engaged in recent years in some joint activities with other Blues. And that this document would also substantiate that conclusion.

BY MS. NELSON:

Q. Okay.

A. But it was not cited in the footnotes to that point.

Q. Is it identified on Exhibit 3005?

A. I don't think so. It may be, because I think all of those were listed -- all of these articles were listed in the back, whether they were relevant or not, because they were turned over.

Q. Yes, it appears on the top of -- I don't know if your page is --

A. Unnumbered.

Q. I have located it, so I'm satisfied it is there.

I presume that Document 3054 was prepared by one of your research assistants?

A. By Kate Thomas, at my request.

Q. Now, would you look at what's been marked as

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3056?

MR. LINDSAY: That's separate from the other stacks.

BY MS. NELSON:

Q. Exhibit 3056 is a copy of the document referenced on page seventeen of your report. And it is the subject of a paragraph that I read for the record beginning with, "It was not just CEO..." That we discussed earlier, as well as footnote twenty-eight; do you recall that testimony?

MR. LINDSAY: Sorry. What page were you on, counsel?

MS. NELSON: Seventeen.

THE WITNESS: Yes.

BY MS. NELSON:

Q. And my question is really simply this: Were you advised by anyone in the course of preparation -- preparing your report, that authenticity of this document, as being a document prepared by an employee of Blue Cross and Blue Shield of Minnesota, is not admitted by Blue Cross and Blue Shield of Minnesota?

MR. LINDSAY: Objection.

BY MS. NELSON:

Q. The question is: Were you told that, Mr. Green, by anybody?

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MR. LINDSAY: Objection.

THE WITNESS: Am I supposed to discuss the conversations -- substantive conversations between myself and counsel?

BY MS. NELSON:

Q. No, you shouldn't. You shouldn't.

The question is really better, perhaps, phrased this way: Did you have an understanding that the document labeled BCBS 0094986 through 94991 was a document -- was a business record of Blue Cross and Blue Shield of Minnesota?

A. Sorry. Could I have the question back now?

(Record read.)

MR. LINDSAY: Objection.

But you may answer the question, other than insofar as it seeks substantive communications with counsel.

THE WITNESS: I'm not to discuss any impression or understanding that arises from conversation with counsel. How am I to answer the question?

BY MS. NELSON:

Q. You're not permitted to address the substance of the conversation. You are permitted to tell me what your understanding was.

A. Well, I guess my understanding is pretty well

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represented in the footnote to the document.

The author of this document is not identified on the document itself, nor does the document bear a date. Internal references suggest that this document, which was found in the Blue Cross files, is a Blue Cross document dating from the mid 1980s. My recollection, some months after writing this segment of the report, is that this document was imbedded in the context of other documents, I think with roughly adjacent nearby Bates numbers, a family of documents, of which this was one. That was part of the context, the internal references that led me to infer that the document was a document of a Blue Cross and Blue Shield employee.

Q. But you can't be certain of that, can you?

A. That -- I can't recall the exact details without reviewing those other documents. But at the time I drew that conclusion from the context of this document and surrounding documents in the collection.

Q. When you reviewed the 4B indices, do you recall a field on there called foundation?

A. Only vaguely.

Q. Did you have any understanding as to what that meant?

A. No.

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Q. Okay. Looking at what's been marked as Exhibits 3057 through 3102, --

A. Yes.

Q. -- Mr. Green, have you relied on any of these exhibits in forming your opinions in this case?

MR. LINDSAY: Objection. Again, not to the compoundish nature of the question, but to the word rely.

THE WITNESS: These documents were provided to me, I think in every case, by Kate Thomas. There may be one or two that came through the efforts of Christianne Diehl-Taylor. I think they are all or nearly all the results of Kate Thomas's research under my general direction. And I reviewed the documents and read them and none of them, I believe, was drawn upon to support any of the conclusions or opinions in the report.

BY MS. NELSON:

Q. Thank you.

I'm going to try this one more time.

Mr. Green, how many drafts of your report were prepared?

MR. LINDSAY: Before we continue, counsel, during the break, in which we were marking exhibits, I took advantage of the opportunity to review your

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questions. And I am prepared, on the basis of your representation that plaintiffs are also willing to provide the same information, I'm prepared to permit this question -- excuse me -- this witness to respond to the question of whether there were drafts of the report prior to the draft that has been marked as an exhibit here today. And how many such drafts.

And, actually, why don't you go ahead and pursue that line of questioning and continue whatever additional specific questions you have, and let me make sure that I understand what they are before I state the conclusion.

BY MS. NELSON:

Q. How many drafts of your report were prepared?

A. There was one draft prepared in association -- at roughly the time of my presentation in Chicago. And then there was this final draft submitted. And in between there was what I would describe as a kind of rolling revision process in my computer, where I worked on different segments of the report on different days, adding material, deleting material, editing material. And so it was a kind of continuing revising process, which ended up in this second and final report.

I can't meaningfully say that there were a

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sequence of separate drafts in that rolling revision process. It was an ongoing process. And as I changed segments, I updated the file in the computer and went on to -- another day to work on another segment of it. And updated the file again.

Q. Would the backup on your computer contain earlier drafts?

A. I don't really know, but I don't think so. Because I save it under the save name and essentially just update it.

Q. What program do you use?

A. I think this is in Microsoft Word.

Q. Is this Windows '95?

A. No. Windows 3.1.

Q. As I understand it, you name the document, you go in and make changes to it, and save the new document?

A. Under the same name as the old, right.

Q. Okay.

A. Because otherwise it just gets all confused and cluttered up. And you throw away old drafts and old paper versions of pages, again, so that I'm not by mistake working on old versions.

Q. But the only effort you made to delete the document from the computer was by saving the new

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document?
A. Right. Just updating it, as I go along.
Q. Are there in existence, to your knowledge, any copies of the draft of the report you presented in Chicago?
A. No.
Q. Your research assistants --
A. That's one of those from which I started updating.
Q. Your research assistants wouldn't have any hard copies of those drafts?
A. I think I showed it to them at the time and then got them back. Tossed them out.
Q. Do you know that for certain?
A. I'm not absolutely certain of that, but that's my recollection.
Q. Would you do me a favor and ask your research assistants whether they have in their position today drafts of your report that you gave in Chicago?
A. Okay.
Q. Did you provide a draft of the report you gave in Chicago to counsel? Yes or no.
MR. LINDSAY: You may answer that, just yes or no. If you know.
THE WITNESS: The word provide is a little

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ambiguous. I showed it to them, but then I took it back.

BY MS. NELSON:

Q. You showed a copy to them and then didn't keep a copy with them, is that what you're saying?

A. Didn't leave a copy.

Q. Didn't leave a copy with them?

A. Right.

Q. Okay. And then I presume Mr. Schwartzbauer, he was the counsel present at that meeting?

A. Mr. Lindsay specifically --

MR. LINDSAY: Excuse me.

The question was Mr. Schwartzbauer.

Go ahead.

BY MS. NELSON:

Q. I had understood Mr. Lindsay wasn't at the meeting in Chicago.

A. That's right.

Q. Okay. My first question to you is: Did you provide a copy of the draft to Mr. Schwartzbauer?

A. I'm not sure of that.

Q. Did you --

A. I don't recall.

Q. Did you provide a copy to Mr. Lindsay?

A. Yes. In the same sense of -- shared it, looked

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at it, took it back.

Q. So Mr. Lindsay didn't retain that copy?

A. Correct.

Q. Now, when you were doing the rolling revision process, as you describe it on your computer, were any of those revisions put into hard copy?

A. Temporarily while I was working on particular pages I might print out chunks and then edit and then roll back into the computer and then toss those pages away.

Q. And did you share any of those revisions with any counsel?

A. Again, with Mr. Lindsay in one or two or possibly three of our meetings along the way, in those months between the Chicago meeting and the preparation of the final copy.

Q. Okay. Now this is a yes/no question. Did counsel make substantive changes to the report?

MR. LINDSAY: That's where I believe we get into the area of substantive communications between the witness and counsel, as to which I think work product is an appropriate objection. And so for that question I'm going to instruct the witness not to answer.

MS. NELSON: Well, I am not asking what the

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substantive changes were. So I am not asking about the communication. I am asking if there were substantive changes.

MR. LINDSAY: You are asking a question about the report. That is the subject matter of the communication. You are asking the witness to characterize the nature of that communication about the report. And I believe you were, therefore, getting into the issue of substantive communications.

MS. NELSON: The question, yes or no, "Were substantive changes made by counsel?" As opposed to the substance of the changes, to evaluate precisely what you're saying; that is, whether substantive or not, was permitted by your side of the case, to inquire into our -- your co-counsel asked those questions of our experts and we did permit the yes/no answer to, "Were substantive changes made by counsel?" Yes or no.

MR. LINDSAY: I understand your statement, but I'm going to stand on my objection, so if there -- well, I believe I've finished.

BY MS. NELSON:

Q. Were any changes made by counsel to the report?

MS. NELSON: That eliminates the judgment call.

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MR. LINDSAY: But you are again getting into the question of specific -- or excuse me -- you are getting into the issue of whether there are any kind of changes and, therefore, the subject of communications between the witness and counsel.

MS. NELSON: No, I'm not getting into the subject. Absolutely not. I'm not inquiring one bit about the subject. I'm inquiring about the facts. The logistics. Were there changes made, were there not changes made.

MR. LINDSAY: I object.

And instruct the witness not to answer.

Same grounds.

MS. NELSON: All right. That's the second time that question has been objected to on the grounds of privilege; is that the ground?

MR. LINDSAY: Yeah.

MS. NELSON: Work product?

MR. LINDSAY: Yes.

MS. NELSON: And in light of the fact that Mr. Lindsay's co-counsel was permitted to inquire in that area -- arena, and argued that it wasn't work product, and now is arguing -- Mr. Lindsay's co-counsel argued it wasn't work product, now Mr. Lindsay is arguing it is work product, I believe

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this is a situation that needs to be addressed by the court so we can have a fair and bilateral arrangement here. And in the event that the court agrees that we should be able to each ask this question, then we would ask that Mr. Green return to respond to those questions and that those costs be borne by the defendants.

There are also follow-up questions to that. The primary follow-up question being: Was the report then rewritten incorporating counsel's changes. I presume --

MR. LINDSAY: Same instruction, same basis.

MS. NELSON: And I have the same record, then, that Mr. Lindsay's co-counsel did argue that wasn't work product and he was permitted to ask that of our experts.

And I would direct the Court's attention, if reviewing this portion of the transcript, to the deposition of Adam Jaffe, which was taken by Mr. Monica in this case. And there was a discussion on the record between Ms. Walburn and Mr. Monica at that deposition regarding work product and the appropriateness of this question. And Ms. Walburn made a record that she assumed that if these questions were asked of our witnesses there would be

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a bilateral arrangement and Mr. Monica replied that that would be the case.

BY MS. NELSON:

Q. Mr. Green, would you agree with me that Blue Cross and Blue Shield of Minnesota is the only entity which provides health coverage to the citizens of Minnesota which has brought this lawsuit against the tobacco industry seeking not only to recover money damages, but also seeking various forms of equitable relief?

MR. LINDSAY: Objection.

You may answer.

THE WITNESS: I'm only aware that this suit involves the State of Minnesota and Blue Cross and Blue Shield of Minnesota and no other insurance companies to my knowledge.

BY MS. NELSON:

Q. Are you aware of any Blue Cross and Blue Shield entity, or any of the traditional for-profit health-care insurers that you referenced in your report, who have brought a lawsuit against the tobacco industry seeking these damages?

MR. LINDSAY: Objection.

THE WITNESS: No, I am not.

BY MS. NELSON:

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Q. I'd like you to locate Exhibit 3006.
A. (Complying.)
Q. Would you agree with me, Mr. Green, that given the reserve corridor mandated by statute, that any monies collected by Blue Cross and Blue Shield of Minnesota as a result of this lawsuit would ultimately be passed through to its subscribers by way of premiums?
MR. LINDSAY: Objection, vague, ambiguous, legal conclusion and speculation.
THE WITNESS: I have no way of knowing what might happen as a result of the outcome of this case.
BY MS. NELSON:
Q. But you know that, having reviewed, as you testified to Exhibit 3006, that Blue Cross and Blue Shield of Minnesota seeks to recover the tobacco-attributable health-care costs of its subscribers; is that correct?
MR. LINDSAY: Objection.
THE WITNESS: I believe that's at least one of the actions or outcomes that Blue Cross and Blue Shield seeks.
BY MS. NELSON:
Q. Okay.
A. But it's not clear how that would or could be

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accomplished and I have no way of knowing how it might in the future be accomplished if the case came out in that way.

Q. But what you do know and what you have testified about, isn't it true, that there is a corridor of reserves which cannot be exceeded under law; isn't that correct?

MR. LINDSAY: Objection, ambiguous, legal conclusion, and speculation, incomplete hypothetical.

BY MS. NELSON:

Q. You can answer the question.

MR. LINDSAY: You may answer.

THE WITNESS: As a nonprofit Blue Cross faces this corridor of reserves from year-to-year, supervised by the regulatory processes. Sometimes they fall outside the corridor and then they need to get back inside the corridor in some corrective way. They had financial difficulties in the past; Blue Shield, in particular, fell below appropriate reserve limits, I believe, at the time, just prior to its merger with Blue Cross in the early '70s.

BY MS. NELSON:

Q. I guess what I'm --

A. As a regulatory process that monitors the

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corridor of reserves.

Q. And what does Blue Cross then do from your research with the money that it gains if it exceeds the corridor of reserves?

MR. LINDSAY: Objection.

THE WITNESS: I haven't investigated that in detail and I don't remember that it's actually happened historically.

BY MS. NELSON:

Q. You don't have any knowledge of that happening, nor do you have any knowledge of what happened, if those monies exceeded the corridor; is that correct?

A. Not in elaborate detail. I assume that the regulator would insist that they get back within the corridor in subsequent years.

Q. And how would they accomplish that? How would they bring into balance the premium coming in, as opposed to the cost going out?

MR. LINDSAY: Objection, vague, ambiguous. Legal conclusion. Foundation and speculation.

BY MS. NELSON:

Q. You can answer the question.

It would have to reduce the premium to reduce the income coming, wouldn't they?

A. Well, there's many options, I think, as to how

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that might occur.
Q. What would be one other option --
A. But that would be one option.
Q. What would be another option?
A. Allow their cost to increase.
Q. Looking at page fifty-three of Exhibit 3006. Have you reviewed the prayer for relief in this exhibit?
A. I believe I read this in some version of this document, when I read the document about a year ago.
Q. Okay.
A. I'm not sure if it's the same version as the one here.
Q. Looking at page fifty-four for a moment, do you see that by way of this lawsuit Blue Cross seeks an order, ordering the cigarette industry to fund a corrective public education campaign relating to the issue of smoking and health, administered and controlled by an independent third party; do you see where I'm reading?
A. I see that language, yes.
Q. And wouldn't such a corrective public education campaign be a direct benefit to the Blue Cross subscribers?
MR. LINDSAY: Objection.

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THE WITNESS: Presumably it would be a benefit to all citizens who were influenced by the education campaign, whether Blue Cross subscribers or not, whether Minnesotans or not, if indeed the campaign had that effect.

BY MS. NELSON:

Q. And isn't it further true that by way of this lawsuit, Blue Cross is seeking an order, ordering the cigarette industry to take reasonable and necessary affirmative steps to prevent the distribution and sale of cigarettes to minors under the age of eighteen?

MR. LINDSAY: Objection.

THE WITNESS: Section E of the same page?

BY MS. NELSON:

Q. Yes.

A. Yes.

Q. And isn't it true that such an order would inure to the benefit, as you say, of all citizens of Minnesota, but to Blue Cross subscribers, as well?

MR. LINDSAY: Objection. First of all, objection to the extent that it purports to characterize the witness's prior testimony. But objection--ambiguous, vague, and speculative.

BY MS. NELSON:

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Q. You can answer the question.
A. If indeed a program were developed under such an order as characterized here, to prevent the distribution of sale of cigarettes to minors under the age of eighteen, and if it were effective, it would presumably reduce the consumption of tobacco by those under eighteen. And if indeed smoking and tobacco are bad for health, that would be a health benefit to those people.
Q. And looking at paragraph F, isn't it true that Blue Cross and Blue Shield of Minnesota by bringing this lawsuit against the tobacco industry is seeking an order requiring the defendants to fund clinical smoking cessation programs in the state of Minnesota; is that correct?
A. That's what the order says. What the clause says, yes.
Q. And isn't it true that if Blue Cross succeeds and the defendants are ordered to fund clinical smoking cessation programs in the state of Minnesota, that that will inure to the benefit of the citizens of the state of Minnesota, including Blue Cross subscribers?
MR. LINDSAY: Same objections.
THE WITNESS: If the court, as an outcome of

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this case, orders the defendants to fund clinical smoking cessation programs, and if those programs are effective, it might -- it presumably would help some number of the participants to cease smoking. And if indeed smoking and tobacco consumption are health risks, then that reduction of smoking by those people would be to their benefit.

BY MS. NELSON:

Q. I want you to turn to page forty-one of your report, please.

A. (Complying.)

Q. On page forty-one of your report, Roman Numeral I, you have made your concluding remarks, have you not, sir?

A. Correct.

Q. And it's entitled, "CONCLUSION: BCBSM's KNOWLEDGE AND DECISIONS ABOUT SMOKING"; is that correct?

A. Yes.

Q. And you cite examples of what you call decisions and choices relating to the health hazards of smoking; is that correct?

A. Yes.

Q. Now the first is BCBSM has decided which illnesses and which treatments it will cover. Are

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you aware, sir, of any smoking-related illnesses or treatments which are excluded from coverage under any of the group policies which are the subject matter of this lawsuit?

MR. LINDSAY: Objection.

THE WITNESS: Would you repeat the question?

(Record read.)

THE WITNESS: I believe there were exclusions in the policies at certain times, at least, for treatments relating to smoking, such as the provision of smoking cessation courses and Nicorette gum and similar products.

BY MS. NELSON:

Q. Was there ever any exclusion from medical treatment for smoking-related illnesses?

MR. LINDSAY: Objection.

THE WITNESS: We're having a -- a problem of definition here --

BY MS. NELSON:

Q. I don't think so.

A. -- on the word medical?

Q. Do you understand what the word medical means? Are you aware of any exclusion --

A. My statement here says it decided which illnesses and which treatments it will cover.

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Q. Yes.
A. And among the treatments it will not cover, or would not cover in some of its policies, are smoking cessation classes and the use of such aids as gums to assist in the cessation of smoking.
Q. Okay. Now I am asking you about medical treatment. Treatment administered by medical professionals, like physicians; okay?
MR. LINDSAY: Are you --
BY MS. NELSON:
Q. For smoking-related diseases.
A. I didn't make a statement about medical treatments. I made a statement about treatments.
Q. Well, I'm asking you this question: Do you believe at any time -- or do you have any knowledge of any time that -- let's break it down. Because you break it down. You say that BCBSM has decided which illnesses and which treatments it will cover. Let's start with illnesses. What smoking-related illnesses have been excluded from coverage to your knowledge?
MR. LINDSAY: Objection.
THE WITNESS: What I have in mind -- what I had in mind when I wrote this sentence was the limited coverage that I've already referred to with respect to smoking cessation efforts and programs.

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BY MS. NELSON:
Q. Is that related to a smoking-related illness, sir?
A. If, as I believe Blue Cross believed -- if, as Blue Cross, I think, believed at the time they were making these decisions, that smoking is associated with health risks; that is, that there are illnesses that may be associated with the act of smoking, then excluding efforts -- coverage of efforts to cease smoking, would seem to increase the risk of those subscribers who continue smoking without the benefit of these treatments. Their exposure to those illnesses which Blue Cross apparently believed they were at risk to, would continue.
Q. Okay. Let's break that down. Different categories here.
First of all, there are illnesses--heart disease, emphysema, you gave some of them to me yesterday. And the question I'm asking, for those smoking-related illnesses, whether there are any medical treatments to treat lung cancer, to treat emphysema, to treat heart disease, that are excluded under Blue Cross policies?
A. I don't believe so.
Q. Okay. Now, referring to treatments for a

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moment. You're talking about the exclusion for smoking-cessation programs, aren't you?

A. Yes. Those are the examples I provided.

Q. What we established earlier is that you don't understand whether smoking-cessation guidance offered by a physician is covered or not; is that correct?

MR. LINDSAY: Objection.

THE WITNESS: I read in the contracts the exclusion of the provision of these services by Blue Cross as the insurer, that it would not pay for the provision of these services.

BY MS. NELSON:

Q. Medical services?

A. Smoking cessation clinics.

Q. By physicians?

MR. LINDSAY: Objection.

THE WITNESS: I don't recall that the exclusion statement had that qualifying phrase in it.

BY MS. NELSON:

Q. Because you did understand that in fact Blue Cross was proactively encouraging its physicians, through the Doctors Helping Smokers Program and Improved Program to identify smokers amongst their patient population and encourage cessation, isn't that right?

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MR. LINDSAY: Objection.

THE WITNESS: The Doctors Helping Smokers Program was an attempt to encourage physicians to encourage patients to cease smoking. But that did not assure the payment for the smoking cessation, which we call the assistance things, like the gums and the patches. And it did not assure the payment to the patient of the cost of taking any smoking cessation classes that they might elect to take.

BY MS. NELSON:

Q. But what it did assure, did it not, was the payment of the physician for providing medical advice regarding smoking cessation?

MR. LINDSAY: Objection.

THE WITNESS: If the physician indeed provided that advice, that was included in the cost of the visit to the physician.

BY MS. NELSON:

Q. Now you continue on and you say: "BCBSM has known for decades about the health hazards of smoking and the habituative or addictive aspect of cigarettes." Would you agree with me that the literature that you provided by way of the exhibits in this case, which is the literature that you relied upon in reaching this opinion, does not clearly state

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that there is a causal relationship between smoking and disease?

MR. LINDSAY: Objection.

THE WITNESS: Some of the literature makes that assertion. Some of the literature contests that assertion.

BY MS. NELSON:

Q. Would you agree with me that the same is true for the literature with respect to nicotine? That some of the literature describes it as some sort of a habit, and others describes it as an addiction?

MR. LINDSAY: Objection.

THE WITNESS: Yes.

BY MS. NELSON:

Q. So what was available to Blue Cross was a debate in the literature, was it not?

MR. LINDSAY: Objection.

THE WITNESS: I would say that the literature that I reviewed had the character of a debate in the 1950s, and had very little of that character in the 1960s and beyond. And less and less so. There were very infrequent, and I think beyond the 1960s, essentially, no assertions in the literature that I reviewed contesting the generally -- repeatedly affirmed belief that smoking was a health risk.

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BY MS. NELSON:
Q. That it caused disease? Or that it was associated with smoking?
A. The phrasing of that varied from article to article, but it was generally uncontested after the 1960s.
Q. What was uncontested? That there was an association?
A. As I say, the phrasing encompassed both association and causation, and that mixture of phrasing from one article to the next, as they appeared, essentially became uncontested in that literature. The overwhelming weight of the literature in those journals that we reviewed, by the 1960s, takes as a premise some version of the claim that smoking and tobacco consumption have health risks associated with them.
Q. Okay.
A. Sometimes it is phrased in causal terms.
Q. Wouldn't you agree with me, though, that the surgeon general of the United States was not persuaded of the addictiveness of nicotine until 1988?
MR. LINDSAY: Objection.
THE WITNESS: I don't know the surgeon general's

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persuasion behind the scenes. The 1988 report was a very explicit assertion of that contention by the surgeon general.

BY MS. NELSON:

Q. Is there any earlier statement by the surgeon general in which the surgeon general states that nicotine is addictive?

A. I haven't researched that question.

Q. You go on to say, "When BCBSM chose at various times not to offer nonsmoker discounts for groups, for example, it did so even while believing that smokers require greater medical expenditures than nonsmokers."

A couple questions about that. Number one: Do you believe that at any time Blue Cross told its member groups that it could not have a nonsmoker discount?

MR. LINDSAY: Objection.

BY MS. NELSON:

Q. Or did it leave it to the groups' discretion, as to whether they wanted to have nonsmoker discount?

MR. LINDSAY: Objection.

MS. NELSON: You can answer the question.

THE WITNESS: I don't recall what's included in

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the report at this moment. And I haven't taken the time to review it at this moment. But I recall documents where Blue Cross and Blue Shield representatives were saying that they were not yet able to offer nonsmoker discounts for groups. The product was not available. And they were exploring the possibilities, but it was not yet available. They were making decisions essentially not to offer the product for a period of years.

BY MS. NELSON:

Q. That's your understanding. That they had the ability to do so and made the affirmative decision not to do so; is that your belief?

MR. LINDSAY: Objection.

THE WITNESS: Your premise, they had the ability to do so, is vague and I don't know what you mean by it. But they had been considering the possibility of offering nonsmoker discounts for groups and decided not to do that.

BY MS. NELSON:

Q. That's your understanding?

A. I saw documents stating that effect.

Q. And so if you learn that there were groups in this case, in this litigation, that have nonsmoker discounts, that would confuse you, wouldn't it?

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A. No. Because at some times they did offer them, in a small number of instances, even while they were declining them in other situations.

Q. You believe that if a group came to Blue Cross and said they wanted a nonsmoker discount, they would turn them down, that they would decline that opportunity; is that your understanding?

MR. LINDSAY: Objection, vague.

THE WITNESS: The correspondence I saw from the Blue Cross documents appeared to represent Blue Cross representatives saying to potential customers that they were not at this point in time, as of the date of those documents, offering nonsmoker discounts for groups.

BY MS. NELSON:

Q. And are those documents reflected on Exhibit 3005, so I know what you're talking about?

A. I'm not sure.

Q. Is it possible that they're not on here?

A. I don't know at this moment whether I developed that particular factual detail in the report to have cited those documents.

Q. It's a statement in your conclusion, is it not? And you are relying exclusively on documents of Blue Cross and Blue Shield of Minnesota that you've

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now testified about several times; isn't that correct?

MR. LINDSAY: Objection.

BY MS. NELSON:

Q. Are they not on 3005? Or you don't know?

MR. LINDSAY: Objection.

THE WITNESS: I'll need to examine the details of the report to see how much detail I went into in the report about these matters that I read in the documents.

BY MS. NELSON:

Q. You can do that on your own time, sir.

I'm presuming that you are prepared to answer questions on the basis of your conclusions of your report, whether it appears there or not.

MR. LINDSAY: I object to that argumentation. And if you do not wish to provide the witness the same opportunities that your own witnesses have been provided to refresh their memory as to specific points in their report, that's certainly your prerogative and you will be deemed to withdraw the question if that's the position you wish to take.

MS. NELSON: I won't be deemed to have done anything.

The question is pending.

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And the concern I have is that we have a conclusion which states very strong, critical statements of Blue Cross, it's based on documents which are not even cited in the conclusion, and apparently this witness doesn't even know if he cited them on the list of documents upon which he relies.

BY MS. NELSON:

Q. So I would ask that during the next break that you insure that you have an answer to that question, Mr. Green, so that we don't have to prolong this deposition any further.

At any time in the nineteen -- at any time from 1983 forward do you believe that if a group approached Blue Cross and asked for a nonsmoker discount that it would have been denied?

MR. LINDSAY: Objection, vague and speculation.

BY MS. NELSON:

Q. You can answer the question.

A. I'll refer you to page twenty-one of my report.

Q. Uh-huh.

A. Incidentally, a comment on your previous statement -- there are no citations in the summary that appears on page forty-one, that's a summary of arguments and conclusions reached and supported earlier in the report. The citations would not

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appear there, but in the earlier parts of the report.
Q. And if you'd show me where those are, I would appreciate that.
A. On page twenty-one of the report there's a paragraph at the top, carries over from the bottom of page twenty, which says, "Blue Cross tried to extend the nonsmoker discount to employer group policies. In July 1985 Sue Klein wrote to Dick Niemiec of their efforts to market to small groups, less than fifty, with discounts of 3 to 5% for groups with 80 to 100% nonsmokers." She mentions that others had been afraid of discrimination action being taken by the smokers who have been charged with the higher rates. They had responded to a request from Blandin Paper Company for a rate quotation, but Blandin decided not to buy it.
Q. Exactly.
A. "In her deposition Sue Busse contends that employers were reluctant to undertake the extra paperwork managing a split rate insurance program," et cetera.
Q. Yes.
A. "As of 1989 the discount was still available only on individual contracts. A letter from Richard Wallace, Blue Cross's Southern District Marketing

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Manager, contended that group contracts were more complex to price and administer, and concluded, 'I am hopeful that the nonsmoking incentives can be incorporated into all of the Blue Cross products as we progress into the 1990s.' Yet in 1989 the Eau Claire Wisconsin Blue Cross was already offering discounts to groups" -- I won't give all the details. And that's documented. "Beginning on September 1, 1990 Blue Cross did give nonsmoker discount rates to individual members of group plans for employees of the Southeast Minnesota Education Cooperative Service Unit, a group of school districts around Rochester, based on the signed affidavits of individuals or families of their nonsmoking status. These nonsmoker policies were a popular option in that region in 1990 to '91, with nine of twenty-four schools still having the policies in 1995."

Q. Have you now provided for me all the evidence that you relied on to reach the conclusions stated on page forty-one of your report, that, as follows: "When BCBSM shows at various times not to offer nonsmoker discounts for groups, for example, it did so even while believing that smokers require greater medical expenditures than nonsmokers"?

MR. LINDSAY: Objection, compound.

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BY MS. NELSON:

Q. You can answer the question.

A. The specific portion of that statement, which refers to not offering group -- nonsmoker discounts to groups, refers back to the section that we've just been looking at, on pages twenty to twenty-one.

Q. Are there any other documents besides those identified on pages twenty and twenty-one, that you relied on in reaching that conclusion?

A. The documents that I rely on in the particular paragraphs on pages twenty and twenty-one are cited there by the Bates numbers.

Q. That's not the question, sir.

The question is: What documents are you relying upon to reach the conclusion on page forty-one that Blue Cross and Blue Shield chose at various times not to offer nonsmoker discounts for groups?

MR. LINDSAY: Strike the initial statement -- counselor has now changed the question and if she wishes to ask that question, that's fine, but I move to strike the editorial comment.

THE WITNESS: Would you repeat the question?

(Record read.)

THE WITNESS: I'm relying on the documents referenced on pages twenty to twenty-one, in the

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course of the discussion there of Blue Cross's struggles over offering or not offering nonsmoker discounts to group policies.

BY MS. NELSON:

Q. Are you relying on any other documents?

MR. LINDSAY: Objection.

THE WITNESS: Not specifically.

BY MS. NELSON:

Q. How about generally?

MR. LINDSAY: Objection.

THE WITNESS: The documents I cited here are the documents that support the argumentation here on page twenty and twenty-one. And that's the basis for the conclusion on page forty-one.

BY MS. NELSON:

Q. Okay.

A. There may be other documents in the larger collection that would add additional support. But these are the ones upon which I've relied in forming the conclusion that's presented on page twenty/twenty-one and summarized on page forty-one.

Q. Let's look at what you've called your argumentation.

In your argument you state that Blue Cross and Blue Shield of Minnesota had responded to a request

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for differential premium in a group policy from Blandin Paper Company; is that correct?

A. Yes.

Q. And who decided not to accept the differential premium?

MR. LINDSAY: Objection.

THE WITNESS: In this case Blandin decided not to accept the -- the dual--rate policy.

BY MS. NELSON:

Q. Is there anything in the paragraphs on page twenty and twenty-one, any document which identifies an instance in which a company came to Blue Cross seeking a differential premium for a group policy and was denied?

MR. LINDSAY: Objection, ambiguous and incomplete hypothetical.

BY MS. NELSON:

Q. You can answer the question.

A. I infer from Richard Wallace's letter, which is cited here, that Blue Cross essentially stopped offering group policy contracts with nonsmoker discounts for that period of time.

Q. For which period of time?

A. Basically we're talking 1985, to when they offered the Rochester area contracts in 1990. The

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initiative didn't come from Blue Cross. I don't know whether other companies made quotations or not. Made requests or not. But Blue Cross was not offering or marketing a group nonsmoker discount policy during those years, to my knowledge.

Q. Who would have to administer such a policy?

MR. LINDSAY: Objection.

BY MS. NELSON:

Q. Wouldn't the employer have to do that?

MR. LINDSAY: Objection?

THE WITNESS: Both the employer and Blue Cross presumably.

BY MS. NELSON:

Q. And who would determine the smoking status on a daily basis in the group?

MR. LINDSAY: Objection.

THE WITNESS: Again, both parties.

BY MS. NELSON:

Q. It's your understanding that Blue Cross would do that?

A. No. I said both parties. There would be a procedure set up between the employer and Blue Cross for ascertaining and verifying the smoking status of members.

Q. And what do you base that on?

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A. You can see it, for example, in Sue Kline's discussion above. And you can also see it in the documents that I read.

Q. You believe in the discussion of Sue Kline that's identified here, that that's a reasonable conclusion, that Blue Cross and the employer would somehow work together to monitor the smoking status of every member of the group on a daily basis?

MR. LINDSAY: Objection.

THE WITNESS: Again, you're adding words to the question.

BY MS. NELSON:

Q. Take away daily basis, then.

You have a huge group of employees and we need to know whether they're smokers or not. And the question is who monitors that, the employer or Blue Cross? And what documents here even talk about that?

A. We're talking now about details beyond the discussion in this report.

Q. That's correct.

Then you conclude, "In my opinion BCBSM was not deceived or defrauded by any alleged actions or inaction of the tobacco companies."

In order to know whether there was deception or

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fraud, wouldn't you need to know whether BCBSM had available to it in the public domain literature with respect to the health effects of tobacco and the addictiveness of nicotine at the same time the industry knew about it? In other words, if the industry had this information decades before Blue Cross did, how would you know from your literature search whether or not they had been defrauded for the period of time that they didn't have that information?

MR. LINDSAY: Objection, vague, ambiguous, and facts not in evidence.

You may answer.

THE WITNESS: Would you ask a more specific question?

BY MS. NELSON:

Q. No, I'm going to ask that question.

MS. NELSON: So if you could, read it back.

(Record read.)

MR. LINDSAY: Same objections.

THE WITNESS: What period of time are we talking about here?

BY MS. NELSON:

Q. The period of time between which the industry knew the facts and Blue Cross had the facts.

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A. What years are we talking about? Talking about the period since 1977? Are we talking about the period since 1890?

Q. I'm asking you. You're the one that reached the conclusion, that there has been no fraud apparently ever. And my question is: How can you reach that conclusion without knowing what the industry knew?

MR. LINDSAY: Objection.

THE WITNESS: My conclusion rests on my research into the awareness and knowledge of Blue Cross and Blue Shield, as to the health risks of smoking. I believe I've established that there was such awareness and knowledge from the 1960s forward, in general, but there's much more detail about that in the report. And about the timing of various indicators of that awareness. So that they were not deceived -- if somehow the tobacco industry was trying to deceive them, they acquired this knowledge of the health risks of smoking and had this awareness from an early time and I would be quite confident, from before 1977, the relevant period of this case. And could make whatever decisions they chose to make about smoking and health in relation to their business based upon that knowledge which they had.

BY MS. NELSON:

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Q. Well, if the surgeon general first declared nicotine to be addictive in 1988, and tobacco industry documents reveal they knew nicotine was addictive in 1963, wouldn't you agree with me -- now we're talking physiologically addictive, not habit-forming, physiologically addictive, like a drug, wouldn't you agree with me for that intervening twenty-five years, even the surgeon general of the United States was defrauded by the tobacco industry?

MR. LINDSAY: Objection. Vague, ambiguous, facts not in evidence, argumentative, speculative. Foundation.

BY MS. NELSON:

Q. You can answer that question.

A. My research hasn't established any date of knowledge of the tobacco industry. I haven't researched their state of knowledge about the health risks of smoking. So I don't have any basis for knowing what they know.

Nor is the surgeon general's report of 1988 the only source of knowledge and awareness available to Blue Cross and Blue Shield of Minnesota about the health risks of smoking or the possible addictiveness of nicotine. There's abundant literature in the medical literature and in the insurance industry, and

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related industry literatures that I've reviewed, which makes assertions to that effect. I think the surgeon general's report of 1988 was kind of a climactic public statement, but it was by no means the first time that one might have known or suspected or believed or been aware that nicotine was addictive, as the surgeon general then asserted. I don't think that kind of knowledge rests on one source, but on many, many sources. Many of which, I think, were familiar and accessible to Blue Cross and Blue Shield of Minnesota particularly in their professional roles as medical and insurance people.

Q. In the course of reviewing all of this medical literature did you see anything referencing a safer cigarette?

MR. LINDSAY: Objection.

THE WITNESS: I didn't review a lot of medical literature. I reviewed insurance industry and related personnel industry literature.

The only medical journal that we have sampled extensively is Minnesota Medicine because of its local contents.

BY MS. NELSON:

Q. In all of that literature that you reviewed, did you see anything about the technology available to

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the tobacco industry to make --

MR. LINDSAY: Objection, vague, ambiguous, facts not in evidence.

THE WITNESS: I don't specifically recall any articles in that insurance industry and related literature that gave extensive discussion to safer cigarette idea.

BY MS. NELSON:

Q. How about any discussion?

MR. LINDSAY: Same objection.

THE WITNESS: Not that I recall at this time.

BY MS. NELSON:

Q. Do you recall any literature in all of that literature that you've identified that addressed the manipulation of nicotine in cigarette tobacco industry?

MR. LINDSAY: Same objections.

THE WITNESS: Again, I don't at this moment recall specific references to that.

BY MS. NELSON:

Q. Do you recall general references?

A. No.

Q. Any references?

A. Not specifically. They may appear in the details of that hundred and ten page report, and I'm

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not recalling at the moment. If they appear there, then I've read them and reviewed them. But at the moment I don't recall specific references to that topic.

Q. And if they don't appear there, they're not there, are they?

MR. LINDSAY: Objection.

BY MS. NELSON:

Q. At least you don't know that, because you relied on that hundred ten page report, didn't you?

MR. LINDSAY: Objection.

THE WITNESS: I don't know whether they're there or not.

BY MS. NELSON:

Q. But you wrote --

A. They weren't discovered in the computer search that Christianne Diehl-Taylor did and reading through the journals that she did on my behalf.

Q. And you wrote your report believing that those references were not there?

A. No, not one way or the other because I didn't specifically address those questions that you just asked me.

Q. And you don't believe that the presence of a safer cigarette or the manipulation of nicotine are

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related to a smoker's health?

MR. LINDSAY: Objection. Vague, ambiguous, argumentative, and facts not in evidence.

THE WITNESS: I didn't specifically research any discussion of safer cigarettes or of --

What's the other topic?

BY MS. NELSON:

Q. Manipulation of nicotine.

A. Manipulation of nicotine levels in cigarettes.

MS. NELSON: Why don't we take a five-minute break?

(Recess taken.)

MS. NELSON: Back on the record.

BY MS. NELSON:

Q. I want to review with you some of the choices that we agreed that Blue Cross made in the face of information in the public domain about the health hazards of smoking.

Would you agree with me that in 1983 Blue Cross offered the first nonsmoker discount for its individual population?

A. The first in Minnesota.

Q. In Minnesota, yes.

A. Yes.

Q. And would you agree they were a founding member

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of the Smoke-free Coalition?
A. Yes.
Q. And would you agree with me that they had --
that Mr. Leif Solberg was a co-principal while at
Blue Cross on the Doctors Helping Smokers Program?
A. Yes.
Q. And that that program was designed to
proactively encourage medical doctors to identify
smokers and encourage reduction of tobacco
consumption?
MR. LINDSAY: Objection.
BY MS. NELSON:
Q. Is that true?
A. Leif Solberg was a co-principal investigator in
Doctors Helping Smokers.
And then the second part again?
Q. And the purpose of the program was to
proactively encourage the physicians in the
Blue Cross network to identify smokers and encourage
reduction in tobacco consumption.
MR. LINDSAY: Objection.
THE WITNESS: And other doctors to do that,
yes.
BY MS. NELSON:
Q. And that in 1987 Blue Cross and Blue Shield of

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Minnesota was one of the first work places in the state to become smoke-free?

A. It did become smoke-free in 1987 and it was among the relatively earlier adopters of that policy, I believe. I don't recall precisely how many other firms in the state of Minnesota had become smoke-free before that time.

Q. And that with its small area analysis in 1985, Blue Cross was able to identify a greater incidence of heart disease in Itasca County and founded the Itasca Heart Project?

A. Jointly, with other folks in the Itasca area, yes.

Q. And that one of the purposes in participating in the Itasca Heart Project was to encourage subscribers in Itasca County from smoking cigarettes? Encourage them to discontinue smoking cigarettes?

MR. LINDSAY: Sorry, can we have that question back?

MS. NELSON: Yeah, I think that's a good idea.

BY MS. NELSON:

Q. One of the purposes of the Itasca Heart Project was to educate subscribers in Itasca County, to encourage them to stop smoking?

MR. LINDSAY: Objection.

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THE WITNESS: The Itasca Heart Project actually sought to educate citizens in Itasca County, and that might include some of the Blue Cross subscribers there, as well. I think the program was a broader, community-based program, available to others in Itasca County, as well.

BY MS. NELSON:

Q. And wouldn't you agree that Blue Cross has a full-time function of providing preventive service guidelines to its providers through the Improved Project, in an effort to reduce the incidence of risky behaviors?

A. I don't know what you mean by a full-time function.

Q. That there is a group at Blue Cross whose full-time function involves preventive care?

A. Yes, I believe that's the case.

Q. And that Blue Cross was a member of the Tobacco Tax Coalition and encouraged increases in excise taxes for the purposes of reducing tobacco consumption?

A. Yes, and that's included in my report.

Q. And all of those were choices that Blue Cross made, were they not, in face of information in the public domain about the health hazards of smoking; is

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that correct?

A. Yes. And most, if not all of those points that you've just been listing, are included in my report.

MS. NELSON: I have no further questions.

MR. LINDSAY: We'll reserve the right to read and sign.

And, obviously, we've both made various statements on the record.

(Concluded at 4:09 p.m.)

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C E R T I F I C A T E

STATE OF MINNESOTA }
}
COUNTY OF GOODHUE }

I hereby certify that I reported the deposition of GEORGE D. GREEN, Ph.D., on the 27th day of August, 1997, in Minneapolis, Minnesota, and that the witness was, by me, first duly sworn to tell the truth;

That the testimony was transcribed by me and is a true record of the testimony of the witness;

That I am not a relative, or employee, or attorney, or counsel, of any of the parties; or a relative or employee of such attorney or counsel;

That I am not financially interested in the action and have no contract with the parties, attorneys, or persons with an interest in the action that affects or has a substantial tendency to affect my impartiality;

That the right to read and sign the deposition by the witness was reserved.

WITNESS MY HAND AND SEAL this 2nd day of September, 1997.

_____
Janet D. Winberg, RPR
Notary Public, Goodhue County, MN
My Commission expires 1/31/2000.

{Seal}

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